Central Law Journal.

ST. LOUIS, MO., APRIL 17, 1896.

The question as to the title of a finder of lost property does not often arise and therefore the recent decision of the court of chancery of New Jersey in Keron v. Cashman is of novel interest. It is most peculiar in its circumstances. There it appeared that one of a party of five boys found and picked up an old stocking in which something was tied up. He threw it away again and one of the others picked it up and began beating the others with it. It was passed from one to another, and finally, while the second boy was beating another with it, it broke open and was found to contain money. None of the boys had attempted to examine it or had suspected that it contained anything valuable. The father of one of the boys took charge of the money and tried to discover the former owner. Afterwards one of the boys claimed the money and the others a division of it. On a bill of interpleader, it was held, that the money was not found in a legal sense until the stocking had come into the common possession of all the boys as a plaything, and that it belonged to all of them and must be divided equally between them. In Durfee v. Jones, 11 R. I. 588, 23 Amer. Rep. 528, 35 Cent. L. J. 417, the bailee for sale of a safe, while examining it found a sum of lost money inside the casing and was held entitled to retain it as finder against the owner of the safe because the owner never had any conscious possession of the money. The cases of Bowen v. Sullivan, 62 Ind. 281 and Merry v. Green, 7 M. & W. 623, not cited by the court in the New Jersey case, are also in point. All of the cases agree that some intention or state of mind with reference to the lost property is an essential element to constitute a legal finder of such property. In Goddard v. Winchell, 35 Cent. L. J. 365, the question arose before the Supreme Court of Iowa as to the ownership of an aerolite which had fallen from the sky. The court held that it belonged to the owner of the land rather than to the person who saw it fall and secured it.

The case of Bratton v. Ralph, 42 N. E. Rep. 644, while establishing the law of Indiana, upon the liability of the land upon which any building subject to a mechanic's lien has been destroyed, to satisfy the claims of the lienor, does not, in any respect lessen the conflict of authority which exists upon the question or supply any means by which a true rule may be evolved. In that case a subcontractor sought to foreclose a mechanic's lien upon the appellant's land for work done and materials furnished in plastering a house in process of erection. Before its completion and before the notice of the lien was filed the building was destroyed by fire, and the question was presented to the court whether the right to the lien was lost with the building or continued against the land. The statute provided that "the entire land upon which any building, erection or other improvement is situated, including the portion not covered therewith, shall be subject to the lien;" and the court allowed the lienor to foreclose his lien and obtain satisfaction from the land, after the building had been demolished, upon the ground that the general purpose of the legislature in passing the statute was to protect laborers and material-men, and the lien should, therefore apply to the land directly, if a recovery from the building itself should become impossible.

As to the question here at issue, the authorities are at variance. Pennsylvania early led off with the holding that the lien was given largely because the land was benefited by the erection of the building, and the lien on the building was the principal thing, while that on the land was merely the incident, it being superadded by the legislature because it was essential to a full enforcement of the lien against the building which had become attached to and a part of the realty. Therefore it was held that, with the destruction of the building, the lien on the land was lost. This holding was also deemed more politic, as favoring future improvements. Other cases take the same view. Presbyterian Church v. Stettler, 26 Pa. St. 246; Wigton & Brooks' Appeal, 28 Pa. St. 161; Goodman v. Baerlocher (Wis.), 60 N. W. Rep. 415; Schukraft v. Ruck, 6 Daly, 1; Coddington v. Beebe, 31 N. J. Law, 477; Shine's Ex'x v. Heimburger, 60 Mo. App. 174. Other courts have been disposed to construe the law liberally in favor of the mechanics and material men, regarding their protection as the principal object of the law, and consid-

ering the right to take the lien to apply equally to the land and building, special priorities of lien, however, being given as to the building by some statutes. Clark v. Parker, 58 Iowa, 509, 12 N. W. Rep. 553; Freeman v. Carson, 27 Minn. 516, 8 N. W. Rep. 764; Steigleman v. McBride, 17 Ill. 300; Schwartz v. Saunders, 46 Ill. 18. The cases of Sontag v. Brennan, 75 Ill. 279, and McLaughlin v. Green, 48 Miss. 175, have also been looked upon as lending some support, although really but slight, to this position. In most, if not indeed in all, of this latter class of cases, it may be admitted that the statutes reserving the right of lien are quite capable of the interpretation placed upon them by the courts, if one is prepared to adopt the rule of construction which is applied by them. While no entirely harmonious rule may be possible, inasmuch as the right of lien in each State is dependent upon distinct legislative enactments, yet since the general object of such acts is the same, and, as the cases admit, the statutes are, in fact, conflicting in no material particulars, one would suppose that in such case as the one presented the courts would reach similar results. That under such circumstances one class of cases should reach a conclusion diametrically opposed to that reached by other courts would seem to indicate that a different rule of construction had been applied, some of the courts adopting a liberal and others a more strict construction of the statute.

NOTES OF RECENT DECISIONS.

LIABILITY FOR INJURIES THROUGH ELECTRICAL APPLIANCES.—In Girardi v. Electric Imp. Co., 28 L. R. A. 596, decided by the Supreme Court of California, it was held that placing electric light wires over the metallic roof of a hotel where persons may come in contact with them, without running them high enough to prevent such contact, is sufficient proof of negligence in case of injury to a person by an electric shock from such wires; and that want of ordinary care of an employee of an hotel, in going out on the roof in a dark night with his employer to secure signs which were threatened during a heavy rain, and coming in contact with the electric wires, which he knew were above the roof but which he may not have known to be dangerous, was a question for the jury. A substantially similar case on the facts in New York is Ennis v. Gray, 87 Hun, 355. The plaintiff was a roofer by trade, and, while at work on the roof of a building was injured by coming in contact with electric wires put up and maintained by a corporation not the owner of such building, and it was held that such company was liable in damages. A case was recently reported in the newspapers in which an appellate court of a neighboring State affirmed a judgment for personal injuries sustained through coming in contact with electric wires, where the defense was that the wires were strung high enough for a person of ordinary height to pass under them, but that the plaintiff came in contact with them because he was an unusually tall man. It was held that the defendant had not exercised proper care for the protection of the public, and that plaintiff's failure to observe extraordinary caution because of his unusual stature did not constitute contributory negligence.

FOREIGN CORPORATION — STATUTORY REQUIREMENTS.—It is held by the Supreme Court of Oregon, in Commercial Bank v. Sherman, 43 Pac. Rep. 658, that a foreign corporation purchasing a note in the State, and having no purpose to do any other act in the State, is not transacting "business" in the State, within Hill's Ann. Laws, § 3276, providing that a foreign banking corporation, "before transacting business" in the State must record a power of attorney in each county, where it has "a resident agent," which, so long as the company has "places of business" in the State, shall be irrevocable. The following is from the opinion of the court:

> The single inquiry presented by this record, therefore, is whether a foreign banking corporation purchasing a promissory note in this State, and with no purpose of doing any other act here, is "transacting business" in the State, within the meaning of the statute. It seems to us this question must be answered in the negative. In our opinion, the statute, when reasonably construed, was intended to prohibit certain foreign corporations coming into this State for the purpose of transacting their ordinary corporate business without first appointing some resident agent, upon whom service of summons could be had in case of litigation between them and citizens of the State, and was not designed or intended to prohibit the doing of one single isolated act of business by such a corporation, with no intention apparent to do any other act or engage in business here.

It will be noticed that the statute does not require the power of attorney to be recorded before "doing any business," but "before transacting business," and that it shall be filed in every county where the corporation has "a resident agent," and shall be irrevocable except by the substitution of another qualified person for the one named therein so long as the corporation shall have "places of business" in the State. These provisions would seem necessarily to indicate that the statute was intended to apply to a corporation whose actual or contemplated business in the State is such as to admit of its having resident agents or places of business therein; and, to have a resident agent or place of business, it must be carrying on, or intending to carry on, its ordinary corporate business; for a corporation doing but a single act of business, with no intention of doing more, could not, in the nature of things, be expected to have a resident agent or place of business. To require a foreign banking corporation to execute and file the power of attorney required by the statute as a prerequisite to its right to purchase a promissory note, or take a mortgage to secure a debt, or to do any other single act of business, when there was no purpose or intention to engage in banking here, would be a very narrow, harsh, and, we think, an unwarranted, construction of the statute. The following authorities, although under statutes differing in detail from ours, tend to support this conclusion: Murfree, Foreign Corp. § 65 *et seq.*; Manufacturing Co. v. Ferguson, 113 U. S. 727, 5 Sup. Ct. Rep. 739; Dry Goods Co. v. Lester, 60 Ark. 120, 29 S. W. Rep. 34; Potter v. Bank, 5 Hill, 490; Gilchrist v. Railroad Co., 47 Fed. Rep. 593. There is nothing in the former decisions of this court or of the federal court construing our statute which, in our opinion, conflicts with these views. In Semple v. Bank, *Re* Comstock, and Bank v. Page, *supra*, the bank was regularly engaged in the transaction of its corporate business in the State. The case of Hacheny v. Leary, *supra*, involved the construction of a statute of the then territory of Washington as applied to a contract made in the territory. That statute differed in many respects from the one now before us, and, besides, the case discloses that the corporation had an agent in Washington actually engaged in the business of soliciting and receiving applications for insurance. For these reasons, the case is distinguishable from the one under consideration.

CONFLICT OF LAWS—DRAFT PAYABLE IN ANOTHER STATE—ASSIGNMENT OF FUND.—The Supreme Court of Illinois decides, in Abt v. American Trust & Sav. Bank, 42 N. E. Rep. 856, that a draft drawn in Illinois on a New York bank and payable in New York is governed by the laws of New York and that such draft will not operate as an assignment *pro tanto* of the drawer's funds in said bank, though the action is brought in Illinois by the payees against the assignee of the drawers to recover the amount of said draft. The court says in part:

It is not, of course, denied that petitioners are creditors of the insolvent firm, and entitled to share with the other creditors in the assets of the estate, but petitioners insist that, by drawing in their favor the drafts on the bank in New York, Schaffner & Co. assigned to them the funds so on deposit in the New York bank—in other words, set apart and appropriated said funds to or toward the payments of said drafts, and that the payees thereupon became entitled to it, and that it is the duty of the assignee to pay the same to the petitioners. It is settled law in this State that a check drawn for value by a depositor on a bank operates as an assignment *pro tanto* of the funds of the depositor on deposit in such bank in favor of the holder of the check. Brown v. Leckie, 43 Ill. 497; Union Nat. Bank v. Oceana Co. Bank, 80 Ill. 212; National Bank of America v. Indiana Banking Co., 114 Ill. 483, 2 N. E. Rep. 401. But it was admitted on the trial, and the decisions of the courts of New York show, that the rule is otherwise in that State. Attorney General v. Continental Life Ins. Co., 71 N. Y. 325; Ætna Bank v. Fourth Nat. Bank, 46 N. Y. 82; People v. Merchants' & Mechanics' Bank, 78 N. Y. 269; Bank v. Clark, 134 N. Y. 368, 32 N. E. Rep. 38. The assignee, who is appellee here, contends that, as the funds on which the drafts were drawn were in New York, in the hands of the drawee there, the contract was to be performed in that State, and must be governed by its laws, and that by such laws there was no assignment or transfer of the funds to the holder of the drafts, and therefore that appellant did not, upon taking up such drafts, have any more right to such funds than the other creditors of the insolvent firm. In support of this contention, National Bank of America v. Indiana Banking Co., 114 Ill. 483, 2 N. E. Rep. 401, is cited. In that case it was held that a check drawn in Indiana on a bank in Illinois would operate to transfer the fund, on the ground that the law of the place where the contract was to be performed must govern—the law of Indiana being, as in New York, that checks do not operate to assign the deposit or a sufficient part to pay them. It is, however, insisted by appellants that as this is not a proceeding against the New York bank, but against the assignee to compel delivery to them of such funds in the hands of the assignee in this State, the laws of New York have no application. The case is doubtful on the facts. But be that as it may, we are of the opinion that the law is against the appellants. The drafts, though drawn in this State, were drawn on the New York bank, and were payable there. The contract was to be performed in New York, and it must be presumed that upon a question of this character the parties contracted with reference to the laws of the State where the contract was to be performed, rather than with reference to the laws of the State where the contract was made. Mason v. Dousay, 35 Ill. 424; Lewis v. Headley, 36 Ill. 433; Adams v. Robertson, 37 Ill. 45; Roundtree v. Baker, 52 Ill. 241; Davenport v. Karnes, 70 Ill. 465; Evans v. Anderson, 78 Ill. 558. Such being the law, and such being the contract we do not think that the payment of the funds by the New York bank to the assignee in this State, even if the facts showed such payment, would give appellant any right to the funds which he did not have before such payment.

CORPORATIONS—OFFICERS — AUTHORITY TO EXECUTE NOTES.—The Supreme Court of Arkansas holds, in City Electric St. Ry. Co. v. First Nat. Exch. Bank, that the authority of the president and secretary of a business corporation to execute promissory notes upon

its behalf, will not be presumed simply because they have prior thereto exercised the power. The court says in part:

Unless the authority is expressly conferred by the charter or given by the board of directors, it may be stated, as a general proposition, that the president and secretary of a corporation are not empowered to bind it by their signatures to commercial paper. They have no inherent power to execute negotiable notes in the name of the corporation. Tied. Com. Paper, sec. 121; Cook, Stock, Stockh. & Corp. Law, sec. 716; McCullough v. Moss, 5 Denio, 567; 4 Thomp. Corp. sec. 4619; Life & Fire Ins. Co. v. Mechanic Fire Ins. Co., 7 Wend 31; Hyde v. Larkin, 35 Mo. App. 365; Pierce, R. R. 32-34; Walworth County Bank v. Farmers' Loan & Trust Co., 14 Wis. 325; 1 Mor. Priv. Corp., sec. 537; Titus v. Railroad Co., 37 N. J. Law, 98-102; Wait v. Association (N. H.), 23 Atl. Rep. 77, and authorities there cited; Bank v. Atkinson, 55 Fed. Rep. 465. Where the authority of the president and secretary to bind the corporation is challenged, as it has been by the answer in this case, that authority should be shown by the proof, and not be presumed as a matter of law. Turnpike Co. v. Looney, 1 Metc. (Ky.) 550; Bacon v. Insurance Co., 31 Miss. 116; 4 Thomp. Corp. 4619; Craft v. Railroad Co., 150 Mass. 208, 22 N. E. Rep. 917; Bank v. Hogan, 47 Mo. 472; Dabney v. Stevens, 40 How. Prac. 341; 1 Wat. Corp. 445; Bank v. Hamlin, 14 Mass. 180; Railway Co. v. James, 22 Wis. 187; Bliss v. Irrigation Co., 65 Cal. 504. We are aware that there are authorities *contra*, and counsel for appellee have cited us to American Exch. Nat. Bank v. Oregon Pottery Co., 55 Fed. Rep. 265, where it is held that, "if the president and secretary sign" a negotiable promissory note, "their authority is inferred from their official relation." This case is analogous, the question being presented (as in the case at bar) on demurrer to an answer which negatived the authority of the president and secretary to issue such paper. But the court, to sustain its position in that case, cited only two cases, viz.: Merchants' Bank v. State Bank, 10 Wall. 644; and Crowley v. Mining Co., 55 Cal. 273. In the case in 10 Wall. *supra*, the court use this language: "It should have been left to the jury to determine whether, from the evidence as to the powers exercised by the cashier, with the knowledge and acquiescence of the directors, and the usage of other banks in the same city, it might not be fairly inferred that the cashier had authority to bind the defendant." True, it is also said, "that if the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them." But we submit that the broad *dicta* of the latter quotation, in view of the fact that there was a usage of other banks, and a usual course of dealing, with the knowledge and acquiescence of the directors shown, were unnecessary for the determination of the question before the court. It was the very language doubtless which caused the learned circuit judge in American Exch. Nat. Bank v. Oregon Pottery Co., 55 Fed. Rep. 265, to hold, as a matter of law, that the authority of the president and secretary would be presumed from the fact that they had exercised it. So, also, in the California case cited to support the ruling in 55 Fed. *supra*, it was admitted that the president, whose authority was being questioned, "was the superintendent and general managing agent, having full control of the business of the corporation."

The difference, therefore, between those cases and the one at bar, and the one in which they were cited, is too obvious for further notice. The facts of the case of Gelpcke v. City of Dubuque, 1 Wall. 175 (where the language above quoted from Judge Swayne in 10 Wall. was first used by him), and in Supervisors v. Schenck, 5 Wall. 772; City of Lexington v. Butler, 14 Wall. 296; Tod. v. Land Co., 57 Fed. Rep. 47-53, and Bank v. Young, 41 N. J. Eq. 531, 7 Atl. Rep. 488,—also cited by counsel for appellee, where this *dictum* has been repeated, did not justify such a sweeping declaration of law. For an examination of these will show that, in some of the cases, municipal or county bonds were in controversy, which showed upon their face authority for their issue; and in other cases, that the contracts or transactions made or performed by the agent of the corporation where such as had been frequently or usually made or performed by him before, in the course of the business of the corporation; or that the corporation had received some benefit from the unauthorized act. But the doctrine announced in American Exch. Nat. Bank v. Oregon Pottery Co., 55 Fed. Rep. 265, is unsound, and not supported by the weight of authority. Besides, the principle it seeks to establish is in conflict with the doctrine announced by the Supreme Court of the United States in Bank v. Armstrong, 152 U. S. 346, 14 Sup. Ct. Rep. 572, where it was held "that the vice-president of a bank, however general his powers, could not exercise such a power unless specially authorized so to do, and that persons dealing with the bank were presumed to know the general powers of the officers." Mr. Morawetz, in speaking of these *dicta* in those cases where they have been incautiously used, said: "They must be considered in view of the facts of the particular cases in which they were made. Taken alone as statement of a principle or rule of law, they are certainly not in accordance with the decisions, and cannot be supported upon any sound principle." 2 Mor. Priv. Corp. sec. 608. The rule that, "if the president and secretary sign, their authority is inferred from their official relation," provided they might have had power under any circumstances to issue such paper for the corporation, is begging the question where the authority itself is challenged. This rule, too, ignores a fundamental principle of the law of agency, whether applied to natural persons or corporations; for corporations can only act through agents. It is said by Mr. Mechem, in his work on Agency (section 289), that "every person dealing with an agent is bound to ascertain the nature and extent of his authority. He must not trust to the mere presumption of authority, nor to any mere presumption of authority by the agent." Judge Miller, of the Supreme Court of the United States, in the Floyd Acceptances, 7 Wall. 666, said: "The person dealing with an agent, knowing that he acts only by virtue of a delegated power, must, at his peril, see that the paper on which he relies comes within the power under which the agent acts." And this applies to every person who takes the paper afterwards; for, said he, "it is to be kept in mind that the protection which commercial usage throws around negotiable paper cannot be used to establish the authority by which it was issued."

CHEMICAL EXPERTS—A TRIO OF IMPORTANT FACTORS IN THE DETECTION OF CRIME.

As expert agencies in leading to the detection of a crime and in aiding the courts in meting out justice to offenders against the majesty of the law none are more important than chemistry; largely because of its scientific exactness. And this certainty of analysis aided by the power of the microscope, and the wonderful reproductive force of photography combined, have marked the destruction of many poor guilty wretches, and such scenes as that court scene described by Dr. Holland in his story of Seven Oaks, are not, in the light of modern science, to be regarded as miraculous. The darkened court room; the awed silence of the assembly; the intense mental strain on those more deeply interested; the awful force of the blow to the guilty man when he first beholds the evidence of his crime illumined by the light of scientific test. Forgery detected by chemical analysis, is not of such rare occurrence in modern times. The murderer, intent on his effort to avoid suspicion, or to throw off the scent of pursuit already hot on his tracks, yet forgets the little spot, almost infinitesimal, caught somewhere on his clothing in the deadly struggle with his victim. He is in the meshes of the law at last. But even then he is secure in his own mind. He knows there was no eye-witness to his crime. He has closed all avenues to detection. The officers of the law have done all they can do. They have faithfully followed every available clue which presented any chance for a solution of the mystery, and now they are at their wits end. The prisoner clamors for his liberty. In our country, as in all other well governed countries, liberty is one of the dearest rights constitutionally guaranteed. It must not be abridged without due process of law. The prison doors are about to open for this guilty wretch when the smallest evidence of his guilt is found. The chemical expert determines the small dark spot on the man's clothing to be human blood. He is held for trial. How is it to be known whether this dark spot is human blood, or the blood of some animal of the brute creation. Chemical science aided by microscopical observation has determined that the fluid of the blood contains a large number of corpuscles. They are counted, measured and photographed. The difference in size, form and condition of these corpuscles in the different members of the animal kingdom is carefully noted. Although the average diameter of the human red corpuscle is still a matter of discussion, the best authorities place it somewhere between 1-3200ths and 1-3500th of an inch in both male and female. These human corpuscles then are to be compared to the corpuscles of the brute creation which chemical experts of great learning have determined to range from 1-3540ths of an inch in a dog, to 1-6366ths of an inch in a goat. Here then is the value of such agencies as science has produced. This evidence, although not infallably correct, is worthy of the greatest consideration by court and jury as being of the best of opinion evidence. Beginning with this slight, but terrible indication of guilt, step by step the awful revelation follows, and the guilty one is brought at last through the employment of scientific agencies, to the bar of justice. It will not do to give in detail instances of *causes celebres* in which these agencies played an important part, in a paper of the length to which this is limited. In many cases an historical importance is given them. It is proposed in this paper to avoid any extended general detail or discussion of the subject, and merely to collect together the case law under these three divisions of the subject: 1. Evidence as affected by opinions of chemical analysis. 2. Evidence as affected by the opinions of microscopists. 3. Evidence as affected by the opinions of photographers and photographic copies.

The practice of admitting the testimony of witnessess who have become qualified by application and experience to express opinions based upon special knowledge of the subject under inquiry is not of modern origin. Such persons as were by the Roman law *artis periti* were summoned into court at the discretion of the judge, so that he might have the advantage of their special knowledge. So the celebrated Criminal Code of the Emperor Charles V. contained an enactment requiring the opinion of medical experts to be taken in those cases when death was caused by violence. In the year 1553 Mr. Justice Saunders said in the case of Buckley v. Rice:[1] "If matters arise in our law which concern

[1] 1 Plowden, 125.

other sciences or faculties we commonly apply for the aid of that science or faculty which it concerns, which is an honorable and commendable thing in our law, for thereby it appears that we don't despise all other sciences but our own, but we approve of them, and encourage them as things worthy of commendation," and instances are recorded in the year books where the courts received the opinions of witnesses who were learned in special sciences and arts. The rule permitting this opinion evidence is exceptional. No rule is better known to trial lawyers than that the opinions of witnesses ordinarily are inadmissible. It is facts, hard, cold facts such as were the groundwork of the philosophy of Thomas Gradgrind, which witnesses are in most cases expected to give. It is not always necessary that a witness should be an expert to give opinion evidence. But it is the province of the court to determine from surrounding circumstances whether or not he will receive other than the testimony of professional witnesses.

1. *Evidence as Affected by Opinions of Analytical Chemists.*—In the detection of poisons by experts the courts receive great help in these days. In England in the year 1530 we are told the offense of poisoning was made high treason, and the offender was denied the benefit of clergy and boiled to death. This terrible form of punishment was largely due to the difficulty in those days of bringing to justice such an offender because of the crude methods of testing by chemical analysis to determine the presence of the poison in the human body. At the present time however all poisons known may be detected by modern methods of scientific test. It has been decided by the Massachusetts court that a chemist who has made an analysis may testify as to what he finds.[2] In these cases of poisoning a thorough chemical analysis of the contents of the stomach and bowles and other parts are deemed indispensable to a correct test for poison in the system. Symptoms of themselves without attendant circumstances are unreliable.[3] In cases of suspected poisoning, the chemical analysis should if possible be made by a chemist of undoubted repute and experience, then in such cases where the testimony of such experts is to be received as to the contents of the stomach, care should be taken to show that the particular anatomical specimen under examination has not been tampered with or any chance interference, and such proof will be exacted.[4] Physicians may give opinion evidence of this character as well as professional chemists.[5] In the examination of blood spots chemists and microscopists may give testimony as to the fact of it being the blood of a human being or that of the brute animal.[6] Such evidence has been received in numerous cases, and now is received without objection. In all these cases the court should require that all questions pointed towards an expert opinion are properly predicated upon facts shown. In the case of State v. Knight, *supra*, the court uses this language: "It would be very difficult for an expert of the most accurate and extensive observation, to exhibit in language, with precision, so as to be understood, those delicate appearances which are appreciable only by the sense of vision. Nothing short of an exact representation of the sight can give with certainty a perfectly correct idea to the mind. A diagram approximating in any degree to perfect representation, when exhibited by one qualified from knowledge and experience to give explanation, may do much to make clear his testimony without

[2] Commonwealth v. Hobbs, 140 Mass. 443; Commonwealth v. Kendrick, 147 Mass. 444. The admissibility of this testimony is very generally acknowledged by the other State courts.

[3] Joe v. State, 6 Fla. 591; People v. Milliard, 53 Mich. 74.

[4] The State v. Cook, 17 Kan. 394. See, also, the suggestion of court in People v. Milliard, 53 Mich. 69.

[5] State v. Hinkle, 6 Iowa, 380. In this case the opinions of two practicing physicians were admitted. One of them stated in answer to a question that he was not a professional chemist but understood some of the practical details of chemistry; that portion which belonged to his profession; that he had no practical experience in the analysis of poisons until he analysed the contents of the stomach of the deceased; that he was previously acquainted with the means of detecting poisons, and had since then had some experience in that way. The other declared that he was not a practical chemist, but understood the chemical tests by which the presence of poisons could be detected; that he had never experimented with the view of detecting strychnine by chemical tests but that he had seen chemical tests by professors of chemistry and that there was one test much relied on, the trial of which he had witnessed. See for *contra* leaning, People v. Milliard, 53 Mich. 74. In a Michigan case it has been held (Peer v. Ryan, 54 Mich. 224), an expert's qualifications depend on his experience and not upon his profession.

[6] Commonwealth v. Sturtivant, 117 Mass. 122, 124; State v. Knight, 43 Me. 1,133; Knoll v. State, 55 Wis. 249.

danger of misleading." And so enlarged photographic copies may be used to assist chemical and microscopical observation, and to preserve the results of such observation. Ordinary witnesses may testify as to blood stains.[7] But such testimony is liable to suffer in a comparison with the technical knowledge of an expert chemist. It would seem that the ordinary witness testifying as to blood stains is not expected to state more than as to the mere fact of such spots being blood spots. He is not expected to give technical evidence such as an expert on the subject might give. The courts very generally agree in regarding the testimony of both as fit to go to the jury for their consideration. But when it comes to the question whether the blood is human blood or that of the brute animal, legal science will require a resort to chemical experts to determine this point.[8] It is important to determine by chemical analysis when blood spots are found on clothing, on which side of the clothing they were deposited. The ordinary witness could do but little here. To the expert, a chemical test reveals the position of the coloring matter of the blood, and he thus determines on which side of the garment the spot first touched.[9] In the detection of forged writing, and the nature and compounding of inks, the age of handwriting, etc., chemical experts have played an important part, especially in these later days of perfected appliances. The test would, of course, be something more than mere observation. As in that case no scientific knowledge or skill is involved.

Micro-chemical examination of inks to determine age has been received in cases. And in all these tests much light appears to be thrown on the inquiry through the testimony and experiments of microscopists. The importance of such testimony is well known and is well illustrated in the case like that of Sheldon v. Warner.[10]

Evidence as Affected by the Opinions of Microscopists.—Upon the question of whether or not a certain exhibit is human hair, the opinion of an expert microscopist would be received, and a witness possessing no special skill as a microscopist has been allowed to testify in this case.[11] In the famous Cronin case, but recently tried by a Chicago court, expert testimony on the subject of hair was received, and a number of microscopical experts gave testimony on both sides of the question. Some of these experts, notably Marshall D. Ewell,[12] of the Northwestern University, claimed that there were no known means of determining human hair from any other kind of hair, while others claimed that they could tell by microscopical test. But whatever be the truth of this contested point, it is certain that such expert evidence is duly respected by the court, and the jury are left to determine where doctors disagree. Microscopical investigation plays an important part in detecting handwriting, forgeries, and alterations, and also in determining the nature of different inks. A holograph will, in which alterations and interlineations appeared, has been admitted to probate upon the testimony of such an expert, that in his opinion the alterations were written at the same time as the rest of the will.[13] An expert accustomed to the use of the microscope after the examination of a note by the use of his appliances, has been allowed to testify that one word had been erased in the body of the note and another substituted.[14] As to the age of writing, in a recent Nebraska case,[15] the opinion is expressed that the question of the age of a written paper is not one of science or skill so as to make admissible the opinion of an expert upon its mere in-

[7] Dillard v. State, 58 Miss. 368-86; People v. Greenfield, 30 N. Y. Sup. Ct. 462, 85 N. Y. 75; People v. Deacons, 109 N. Y. 374.

[8] The People v. Gonzalez, 35 N. Y. 49, 61.

[9] State v. Knight, *supra*. And the chemical expert may state what direction the blood stain took. See Commonwealth v. Sturtivant, 117 Mass. 122. But in a case decided in Mississippi some years ago where it was proposed to ask the experts to give their opinions as to the relative positions of the combatants at the time of the affray when blood was deposited on the shirt of the victim with a view of showing by the blood stains that the prisoner was probably prostrate on the ground and deceased on top of him when the stains were received, the court held against the submission of this testimony on the ground that it did not involve any matter for scientific research or special skill. Dillard v. State, 58 Miss. 368, 387.

[10] 45 Mich. 638.

[11] Commonwealth v. Dorsey, 103 Mass. 412.

[12] Also Dr. Lester Curtis and Prof. Harold Moyer.

[13] *In re* Goods of Hindmarch, 1 P. & M. 307.

[14] Dubois v. Baker, 30 N. Y. 355. In a like case an expert has been allowed to state that one figure has been substituted for another; Nelson v. Johnson, 18 Ind. 329, and the cancelling of certain words; Beach v. O'Riley, 14 West Va. 55.

[15] Cheney v. Dunlap, 20 Neb. 265.

spection. The court in giving the opinion seems to indicate, and we do not doubt such to be the law of evidence, that after a scientific analysis of the ink used, and such attendant experiments as would naturally be followed in forming anything like a correct scientific conclusion, such testimony would then have been received. In the examination of blood spots the microscope is a great aid in determining whether it is human blood or not. Although if the blood has long been dried on the clothing, Taylor in his work on Med. Jurisprudence, says their is no certainty of either chemical analysis of microscopical examination aiding a correct conclusion.[16]

Evidence as Affected by the Opinions of Photographers and Photographic Copies.—Photography has been made an important aid to courts and public officials in these latter days. The delicate, but wonderfully powerful design of the camera, imitating as it does the most wonderful piece of the human organization, designed by the creator to enable the mind to properly comprehend and enjoy the the beauty of the universe, has given us the benefit of a beautiful art to aid science in its work. A distinguished expert in speaking of the photographical art in connection with showing the difference in inks used in a certain case says "the photograph is able to distinguish shades of color which are inappreciable to the naked eye; thus where there is the least particle of yellow present in a color, it will take notice of the fact by making the picture blacker just in proportion as the yellow predominates, so that a very light yellow will take a deep black. So any shade of green, or blue, or red where there is an imperceptible amount of yellow will print by the photographic process more or less black, while either a red, or blue, verging to purple, will show more or loss faint as the case may be. Here is a method of investigation which may be very useful in such cases and which will give no uncertain answer." In the case of Town v. Parkersburg Branch R. R. Co.,[17] the court held the testimony of photographers as not always reliable. In this case an offer to establish the forgery of certificates in controversy by a comparison with photographic copies of originals was made. The court said: "As a general rule, as the medin of evidence is multiplied the chance of error increases. Photographs do not always produce *fac-similes* of the objects delineated, and however indebted we may be to that beautiful science for much that is useful as well as ornamental, it is at least a *mimetic* art which furnishes only secondary impressions of the original that vary according to the lights and shadows which prevail whilst being taken." The photographic art is not perfect, but it at least approaches nearer to perfection than any other known power of reproduction by copying process. If the court looked for perfect results in the applied test before it, the reasoning above is not to be wondered at. However, the reasoning in the case of Marcy v. Barnes,[18] is the very reverse of this. Photographers have been allowed to state an opinion as to whether photographs in evidence were well executed.[19] Photographic copies of the *locus in quo* are competent to go to the jury whenever it is important to show such fact.[20] Questions of identity of person have been established by photographs.[21] In these cases it is but fair to state that such photographic copies were received upon the theory that no better means of identification were at hand. Such evidence must of necessity be only secondary in its nature. The court said in the case of Udderzook v. Commonwealth, above cited: "The Daguerrean process was discovered in 1839 it was soon followed by photography. It has been customary, and a common mode of taking and preserving views as well as the likenesses of persons, and has obtained universal assent to the correctness of its delineations. We know that its principles are derived from science; that the image on the plate made by the rays of light through the camera are dependent on the same general laws which produce the images of outward forms upon the retina through the lenses of the eye. The process has become one in gen-

[16] See page 307, Taylor's Med. Juris.

[17] 39 Md. 693, 17 Am. Rep. 540.

[18] 16 Gray, 161.

[19] Barnes v. Ingalls, 39 Ala. 193.

[20] Randall v. Chase, 133 Mass. 210; Church v. City of Milwaukee, 31 Wis. 513; People v. Buddensick, 103 N. Y. 487; Bliss v. Johnson, 76 Cal. 597; Blair v. Pelham, 118 Mass. 421; Cozzens v. Higgins, 33 Howard Prac. Rep. 439. In Ruloff v. People, 45 N. Y. 213, same was held; Barker v. Perry, 67 Iowa, 146; Locker v. Sioux City, etc., R. R. Co., 46 Iowa, 109; Dyson v. N. Y., etc., R. R. Co., 57 Conn. 9.

[21] Udderzook v. Commonwealth, 76 Penn. St. 340; Marion v. State, 20 Neb. 233; Ruloff v. People, 45 N. Y. 213; Brooke v. Brooke, 60 Md. 529.

eral use, so common that we cannot refuse to take judicial cognizance of it as a proper means of producing correct likenesses." This seems better reasoning than that of the Maryland court. In the case of Leathers v. The Salver Wrecking Company,[22] it was held that photographic copies of public documents on file in the public departments at Washington, which public policy requires should not be removed, are admissible in evidence when their genuineness is authenticated in the usual way. Photographic copies were not received with the depositions of witnesses living in another State who had stated their opinion of the genuineness of disputed handwriting, the opinion being based upon a photographic copy of the instrument in dispute attached to interrogatories. The conclusion reached by the court in this case[23] was that photographic copies of instruments sued on could only be used as secondary evidence, and rejected the testimony on the ground that no foundation had been laid for it. In the matter of Foster's will decided in 1876,[24] the court says: "If the court had permitted photogaphic copies of the will to be given to the jury with such precautions as to secure their identity and correctness, it might not perhaps have been error;" although the court in its conclusion passed against the admission of such copies. The same conclusion was followed in Maclean v. Scripps.[25] A photographed copy of a forged note that has since become illegible, is admissible to prove the words of the note upon proof that it is an exact copy of the words.[26]

Owosso, Mich. PERCY EDWARDS.

[22] 2 Wood, 682 (U. S. C. C.).
[23] Ebone v. Zimpelman, 47 Texas, 503.
[24] 34 Mich. 23.
[25] 52 Mich. 214, 219.
[26] Duffin v. People, 107 Ill. 113.

MUNICIPAL CORPORATIONS—SEWERS—NEGLIGENCE.

FUCHS V. ST. LOUIS.

In the Supreme Court of Missouri, March 3, 1896.

A city is liable for any omission of reasonable and ordinary care in the management of its sewers. What is ordinary care depends very greatly on the facts and circumstances of each particular case.

BARCLAY, J.: This action was brought under the damage act (R. S. 1889, ch. 49, secs. 4426, 4427), to recover for the death of Mr. Carl E. Fuchs. Plaintiff is his widow and charges that his death was occasioned by the wrongful act or neglect of the defendants, which charge the defendants deny. The defendants are the City of St. Louis and the Waters-Pierce Oil Company. The case came to trial in the circuit court, in St. Louis. At the close of the testimony instructions were given to the effect that plaintiff could not recover against either defendant. Plaintiff took a nonsuit with leave, etc., and having, without result, duly moved to set it aside, brought the case here by appeal, after the customary exceptions preserving her case for review. The plaintiff's husband was killed by the explosion of a public sewer which was in the possession and control of the city. The question presented by this appeal is whether the facts tend to show a liability for that misfortune, as to either one of the defendants. Mr. Fuchs had for many years owned a building on the east side of Fourth street between Chouteau avenue and Convent street. In July, 1892, he occupied the lower floor and cellar of this building as a place of business, where he conducted a saloon. The house stood over a public sewer, built there by the city, before he acquired the property in 1884. The house was built in that year. The sewer was called the "Mill Creek Sewer." It was a large one, constructed and maintained by the city. It was used to drain an extensive territory, as well as to carry off the surface water and sewage from the public buildings in the central part of the city, including the City Hall, the "Four Courts," and the jail. The sewer extended from the west beneath and across Broadway (or Fifth street) and Fourth street, underneath and across Mr. Fuchs' lot, and thence eastwardly, a distance of about four blocks, to the Mississippi river, its outlet. The sewer was provided with several closely covered openings or manholes which were available for ventilating it. Several of those manholes were located along the line of the sewer near the saloon property, one of them a short distance west of it. The sewer was about 14 feet in diameter, had an arched top, and was built chiefly of masonry. July 22, 1892, about noon, a fire broke out on the premises of the Waters-Pierce Oil Company, located some ten blocks west, and two or three blocks north, of the saloon. While the fire was in progress, and the city fire engines were throwing streams of water on the burning buildings, large quantities of oil and water ran from the premises of the oil company, and spread out among the railroad tracks adjoining. Then a gang of laborers, under direction of the chief of the St. Louis Fire Department, dug a trench among the railroad tracks, and by that means conducted the oil and water into a drain leading to the Mill Creek sewer. This oil was not burning at the time. The men who did this were not on the premises of the oil company, and no officer of that company present was seen or heard to give them any directions concerning the prosecu-

tion of the work, nor was it shown that the workmen were in the employ of the oil company. Nor was the sewer inlet, into which this oil was conducted on the premises of the oil company. How much oil ran into the sewer does not clearly appear, but the amount was, at least, three or four hundred gallons. Four days after the fire the explosion occurred, shortly after 4 P. M. The immediate cause was the act of an employee of a shop on the opposite side of the street from the saloon, who went into the cellar in the course of his business, taking a lighted candle. As he approached the drain or sewer inlet, there was a puff of flame and an explosion which knocked him off his feet, stunned him, and set fire to his clothes. He remembered nothing more for some time thereafter, but another man near him took up the story at that point and testified that the big explosion (which demolished part of the saloon) occurred before you could count ten, after the mishap to the man with the candle. The final explosion made a noise like a cannon, as one witness described it. It tore open the top of the sewer for a long distance, and among other damage blew out part of the saloon building and killed the plaintiff's husband. The drain opening into the cellar where the explosion originated connected with the Mill Creek sewer. The presence of a large body of oil in the sewer at the time and place of the catastrophe was established by the testimony of a witness who was sitting at a table in the saloon with Mr. Fuchs when the explosion took place. This witness was thrown into the sewer and swept down it a distance of several hundred feet, but was fortunate enough to escape alive. His evidence showed the presence also of much coal oil gas in the sewer while he was in it. There was evidence that the conflagration at the oil works was large and attracted general public attention. A gas engineer, of many years' experience in manufacturing gases from petroleum and its products, testified for plaintiff that crude petroleum, exposed to a temperature of 60 degrees Fahrenheit, in a confined space, given off inflammable vapors or gases which will explode when brought into contact with flame; that naptha is one of the first products of the distillation of the crude petroleum, and is lighter, and the like vapors will form from it speedier than from the crude oil in the same temperature; that these vapors or gases are lighter than the air and rise, and, although not combustible spontaneously, will explode so soon as a flame comes in contact at any point with the gas. The evidence also indicated that the outlet of the sewer at the river was stopped up by reason of the high stage of water. There was evidence to show that some of the large manholes or inlets, to this sewer, in the vicinity of the saloon, were not opened after the oil ran into the sewer, and that the cover of a manhole in the street west of the saloon was thrown into the air by the explosion and broken in pieces. The death of plaintiff's husband occurred July 26, 1892, the day of the disaster, and this suit was instituted on September 16th following: 1. The first question is whether the case should have gone to the jury on the issue of negligence on the part of the city. Irrespective of any inquiry as to the capacity of construction of the sewer, it is settled law in Missouri that a city is liable for any omission of reasonable or ordinary care in the management of such a property. What is ordinary care depends very greatly on the facts and circumstances of each particular case. In determining what care of property is reasonable, its situation and the objects of its use should be considered.

Here was a large sewer which ran under business buildings in a populous part of the city, and the sewer exploded in the circumstances described. There is not, by the way, the slightest claim or suggestion of any negligence on the part of the deceased. That a large body of inflammable oil had entered the sewer, because of the fire at the oil works, was a fact which the jury might naturally have inferred the city had notice of, after a lapse of four days, as also of the high water in the Mississippi river prevailing at that time, preventing a free discharge of the contents of the sewer in that direction. The fact that gases form from such oils, upon subjection of the latter to heat, is a matter of ordinary scientific knowledge, of which courts will take judicial notice. It was, moreover, testified to as a fact in the case before us. In view of the conditions existing at the time of the disaster, what was the duty of the city; or, rather, what fair inferences may be drawn (from the fact of the explosion and its circumstances) as to the performance or nonperformance by the city of the duty of ordinary care towards its citizens living along the line of the sewer? It is in evidence that the large vent or manhole in the street, just west of the saloon, was tightly covered during the four days from the fire to the explosion, and that when the latter occurred the iron cover of that opening, about three feet in diameter, was thrown a great distance by the force of the shock. The time was summer—the latter part of July. Yet nothing whatever appears to have been done by the city authorities, so far as this evidence indicates, toward averting the effects likely to follow the escape of such a large body of volative oils into a sewer whose natural outlet was obstructed by the high water in the river, as stated. All the facts which made the sewer dangerous might fairly have been found to be within the knowledge of the city officials, after the lapse of time following the fire. Vanderslice v. Philadelphia (1883), 108 Pa. St. 102. Carefully managed sewers do not, according to the common experience of men, usually blow up and scatter destruction and death. Such a performance is of itself entitled to consideration on the issue of care in respect of such property; or, as some jurists have said: "The thing itself speaks." Had the cover of the large opening west of the saloon been removed, so as to allow the direct escape of the gas at that point, it

may be that the disaster would have been avoided. It was not removed; nor do any other steps appear to have been taken in regard to the care of the sewer by the city authorities after the flow of the oil into it on the 22d of July. It is not always consistent with common prudence to await a catastrophe before taking precautions against it, nor is it conclusive of careful management that a particular disaster had never before occurred. It is often an essential part of reasonable care to guard against those performances which men of ordinary prudence would naturally and reasonably anticipate in dealing with such dangerous agencies as science has contributed to our highly complex civilization. To what extent such foresight is demanded by the duty to use ordinary care it would be very difficult to say. We shall not attempt to generalize on that topic now. And as the cause at bar should be brought to another trial, we do not propose to go into any further comment on the facts that seems needful to indicate our general view as to their probative force and tendency. It appears to us, on the testimony submitted, that it cannot be declared as a conclusion of law that the city fully performed the full measure of its duty in respect of the sewer property; and hence that the learned trial judge erred in giving the instruction which denied plaintiff the right to go to the jury for a finding of fact as to the alleged negligence of the city. 2. Touching the charge against the oil company, there is no evidence as to the origin of the fire at the works, nor any evidence of any want of care on the part of the company in regard to the flow of oil into the sewer. That flow was caused by the direction of the chief of the city fire department for the purpose of averting the danger of spreading the conflagration. The oil company was not responsible for that action on the facts shown, nor was it responsible for the care of the public sewer which exploded four days later. We conclude that the ruling and finding as to the oil company should be affirmed; but as to the city the judgment is reversed and the cause remanded for a new trial. Brace, C. J., and Robinson, J., concur. Macfarlane, J., concurs in the result.

NOTE.—The questions involved in the principal case have been before the courts frequently, and their decisions are in harmony on most of the propositions considered. It is admitted that a municipal corporation is not answerable in damages for the negligent acts of its officers in the execution of such powers as are conferred on the corporation or its officers for the public good. Such powers are considered to be governmental functions, and of no peculiar advantage to the corporation. Ulrich v. St. Louis, 112 Mo. 138. The authority given to construct sewers is held to be legislative and *quasi* judicial. Woods v. Kansas City, 58 Mo. App. 272; Schreiber v. Mayor of New York, 32 N. Y. Sup. 744; Hession v. Wilmington (Del., June, 1893), 27 Atl. Rep. 830; Fort Wayne v. Coombs, 107 Ind. 75; Wessman v. Brooklyn, 16 N. Y. Sup. 97. It is discretionary with the municipality as to what, if any, action shall be taken in the premises. Therefore the municipality is not responsible because of damages sustained by reason of its failure to construct any sewer (Woods v. Kansas City, *supra*; Seifert v. Brooklyn, 101 N. Y. 136; Fort Wayne v. Coombs, 107 Ind. 75), or because the sewer it provided was not sufficient for the public necessities, or was built upon a defective plan. Schreiber v. Mayor of New York, *supra*; Wessman v. Brooklyn, 16 N. Y. Sup. 97. It would follow that there would be no liability, the municipality having acted in good faith, though the sewer was inadequate for the ordinary demands on it (Hession v. Wilmington, *supra*; Schreiber v. Mayor of New York, *supra*), but this is not always conceded. Fairlawn C. Co. v. Scranton, 148 Pa. 231; Los Angeles C. Assn. v. Los Angeles, 103 Cal. 461. It has been held that, after experience has demonstrated that a sewer is, under ordinary conditions, insufficient for its purposes, a city is liable for damages accruing from its existence. Netzer v. City of Crookston (Minn., Nov., 1894), 61 N. W. Rep. 21. So if the sewer results in a direct and physical injury to any one, but such result may be avoided by a change of plan, the city is liable for all injuries which may accrue therefrom, after it has been notified of the injuries resulting therefrom. Seifert v. Brooklyn, 101 N. Y. 136. When a city undertakes the construction of a sewer, its duties in constructing the same properly according to the plan, in keeping it in repair and in proper condition, are considered to be ministerial (Seifert v. Brooklyn, *supra*; Hession v. Wilmington, *supra*), and ministerial duties are mandatory. Woods v. Kansas City, 58 Mo. App. 272. Therefore a city is held liable for damages accruing from any defect in carrying the plans for the construction of a sewer into execution (Hession v. Wilmington, *supra*; Valparaiso v. Cartwright, 8 Ind. App. 429; Woods v. Kansas City, *supra*; Netzer v. City of Crookston, *supra*; Fort Wayne v. Coombs, 107 Ind. 75), for negligence in keeping it in repair (Wessman v. Brooklyn, 16 N. Y. Sup. 97; Fort Wayne v. Coombs, *supra*), for allowing poisonous gases to escape from it (Atlanta v. Warnock, 91 Ga. 210; Dallas v. Schultz (Tex. Civ. App., May, 1894), 27 S. W. Rep. 292), for allowing it to become obstructed, and for any other negligence in managing it, whereby anyone has been injured. Woods v. Kansas City, 58 Mo. App. 272; Valparaiso v. Cartwright, *supra*. In such cases only ordinary care is demanded from a municipality. Netzer v. City of Crookston, *supra*; Wessman v. Brooklyn, 16 N. Y. Sup. 97. Where a sewer gets out of repair or contains obstructions, it has been held that the municipality is not liable for damages arising therefrom, until it has been notified of its condition, or such condition has continued so long that notice thereof is to be imputed. Seifert v. Brooklyn, 101 N. Y. 136; Woods v. Kansas City, *supra*; Fort Wayne v. Coombs, 107 Ind. 75. When the damages complained of have been due to some extraordinary flow of water occasioned by an unexpected flood, or to an act of God, or to an inevitable accident which could not have been reasonably foreseen, all the authorities agree that there is no liability therefor (Los Angeles C. Assn. v. Los Angeles, 103 Cal. 461; Hession v. Wilmington, *supra*; Dist. of Col. v. Gray, 1 Dist. Col. App. 500; Fairlawn C. Co. v. Scranton, 148 Pa. 231), unless some negligence of the municipality, amounting to want of ordinary care, concurred in, and contributed to, said damage. Woods v. Kansas City, *supra*. When the injury occurs from an accident, which there is no reason to apprehend, or from the omission of some precaution, which, if taken, would have prevented the injury, which could not reasonably have been anticipated, and would have occurred only under excep

tional circumstances, there is no liability. Cases cited by Sherwood, J., dissenting in the principal case; Sullivan v. Jefferson Ave. R. R. (Mo.), 34 S. W. Rep. 566. [Sherwood, J., in a separate opinion, does not consider the latter opinion to be in harmony with the principal case.] If, in making sewers or other street improvements, the flow of surface water is altered, a municipality is not liable for damages caused thereby, though the work is done negligently or on a defective plan (Champion v. Crandon, 84 Wis. 405), unless thereby the water is first accumulated by artificial means, so as to increase the volume and detrimental effect with which it flowed on the land of the complainant. Wakefield v. Newell, 12 R. I. 75; Field v. West Orange, 46 N. J. Eq. 183; New Albany v. Ray, 3 Ind. App. 321. The liability of municipalities for defects in their sewers is considered to arise from the theory that the creation of sewers is for the benefit of their special or local interests, and is not a governmental function.

S. S. MERRILL.

BOOK REVIEWS.

SHINN ON ATTACHMENT AND GARNISHMENT.

The subject of this treatise was not known to and has no precedent in the English common law. It is entirely the creation of statute and every State in the Union has enacted laws, more or less similar upon the subject. Questions relative to the construction of and procedure under attachment and garnishment statutes constantly arise and with increasing frequency in response to the demands and growth of mercantile life. It may also be said that there is no subject of the law which presents to the practitioner more perplexing problems or in reference to which more diversities of opinion exist. For this reason a new and exhaustive treatise on the subject is a valuable addition to the library of every practitioner. This may be said without detracting in the least from the merits of older productions; for as to a subject exclusively statutory, and having nothing of common law interest it will readily be understood that a text book to be of value must be not only exhaustive, but also a compendium and discussion of the later questions and cases. The work of Charles D. Drake on the subject was, at the time of its publication, considered masterly, but it has long ceased to be of modern value in view of the rapid development and change of the law governing the subject of attachment and garnishment. The only work within recent years which has present value is that of Mr. Waples but while having great merit it is not as complete or exhaustive as the volumes before us. It would be impossible within the necessary limits of this review to enter into a detailed analysis of the contents of the two very large volumes wherein the author has considered the American law of Attachment and Garnishment. It will have to suffice us to say that he discusses in successive chapters the origin, nature and purpose of attachment, what demand will support the action, what property or interest may or may not be attached, the parties to and ground for attachment, the affidavit, the bond, the writ, execution and return thereof, possession of attached property, release of possession, the lien created by attachment, dissolution of the attachment, liability of the plaintiff bevond the covenants of the bond, priorities, intervention, incidental matters of pleading and practice, judgment execution and sale. All the above appears in the first volume. The subject of garnishment appears in volume two. Here there are chapters on definition, nature, scope and effect of garnishment, who may be held as a garnishee, efficiency of garnishment, the process and its operation, the answer, its contents and effect, proceeding when answer is wanting or unsatisfactory, interplea in garnishment, judgment in garnishment, and garnishee's protection from other suits. The above statement of its contents will serve to show the scope of the work and its very complete and exhaustive character. An examination of the volumes themselves will but emphasize this conclusion. They exhibit throughout exceeding care and great diligence in the accumulation of the material. We cannot discover that any cases on the subjects or any questions which might properly be found therein have been omitted. The text is written in a clear admirable style and the author discusses in a vigorous and luminous manner many controverted and perplexing questions. It has an admirable index and table of cases. We do not hesitate to commend the work to the profession as having decided merit and of great modern usefulness. Of its mechanical execution we cannot but speak in great praise. The volumes are beautifully printed and the binding and exterior appearance exceptionally good. Published by Bowen-Merrill Co., Indianapolis.

HUMORS OF THE LAW.

At the last banquet of the Kansas City Bar Association, Judge Barclay, of the Missouri Supreme Court, made a witty response to a toast, in the course of which he read the following clever satire upon the opinions of courts, the author of which he said was unknown: Blackstone v. Mumm, appellant, March term, 1895. Opinion of the court by Jackson L. Gillison, J.

This is a suit on the equity side of the court—the tender side, as it were—and the facts will be sufficiently involved during the course of our remarks.

It appears from the bills of fare, doctor's bills, prescriptions, and other papers in the case, that the defendant, Mumm, brought an action of ejectment against the plaintiff, Blackstone, and obtained judgment of ouster and possession with ten dollars damages for rents, carriages and shutters, in February, 1895.

The present dress suit is now pressed with a view to set aside that judgment on the ground of fraud and conspiracy.

It is claimed by Blackstone that, during the trial of the ejectment action, Mumm became personally acquainted with the witnesses for Blackstone, and loaded them so heavily with spirits and *res gestæ* that the burden of proof was more than they could bear; so they sat down (on the witness stand) and swore in favor of Mumm when, in point of fact, in their normal and innocent high school condition, their statements and actions were all in support of Blackstone (as he walked home).

Because of this fraud, in changing their evidence, Blackstone asks relief.

The case has the odor of a case of champagne and the testimony is highly spirited. The witnesses alleged to have been so inverted and demoralized do not appear to know exactly which side they undertook to lie on at the ejectment trial. They refer in their testimony to a great banquet, and speak of having been "extra dry," of trying to "dry-'em-on-a-pole," of "boiled owls" and "Black larks." They also mention "blind tigers," "meandering straights," and other matters of which courts cannot take judicial notice in term time.

The counsel for Mumm objected to all those statements of fact without proof of the witnesses' meaning, professing deep and deadly ignorance of such nomenclature.

This court (whatever they may know in vacation or on fishing excursions) is bound to assume that those objections were interposed in legal good faith, and will treat them (as well as counsel) to the best we have in court.

But it seems that our learned trial brother, Judge Scarrit, a jurist of large experience, ruled that those matters were all proper and usual subjects of judicial cognizance in Kansas City at all times. He found that the witnesses for Blackstone in the original suit had been deluded and tinctured by Mumm, and hence granted to Blackstone the prayer of his petition.

But it should be noted that Blackstone was numerously present at the event to which the witnesses refer and took part in the *res gestæ*, described by them. The learned judge overlooked Blackstone's contributory negligence in the premises. Blackstone should have stopped, looked and listened more closely to the proceedings of the banquet in order to protect his witnesses (his team as it were) from coming into proximity to such dangerous agencies as Mumm was at that time operating.

After a careful review of the record, this court is of opinion that the very able and eloquent trial judge must have imbibed (among other things) rather too liberal an idea of the weight of Blackstone's evidence; and that his judicial notice was somewhat too extended for open court.

It appears, moreover, that the court took a recess, during the trial, to observe some curious experiments with various fluids mentioned by some of the witnesses. Those experiments were conducted at a neighboring drug store by the judge, assisted by some experts who testified in the cause to throw light or darkness on the points involved. This was clearly error. The jury, called to aid the court in trying the issue of fraud, should also have been invited to participate.

In a case purporting to be equitable in its nature, it was serious error to treat the jury thus, or rather not to treat them better by permitting them to share in the aforesaid fluid experiments.

The depression and gloom of the jury, in such circumstances, would readily lead them to find fraud and conspiracy on very slight testimony. This has been settled by a long line of solid authorities, Lathrop's Angell, Carriers, Sec. 43; Jones on Liens, Sec. 5.6; Phillips' U. S. Practice, Sec. 406; Ball's Leading Cases, 68; 1 Dean on Blockades, 119; 2 Hagerman on Jackpots, p. 60, *ante*; Black on Intoxicating Liquors, Sec. 425 and cases cited.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ACCORD AND SATISFACTION — Conclusiveness.—A contract stating that it is in full settlement of all actions and causes of action on account of all matters of any kind between the parties is conclusive as to any controversy existing, where there was no evidence of fraud or mutual mistake.—LAUZON v. BELLEHEUMER, Mich., 66 N. W. Rep. 345.

2. ACCOUNT STATED—Evidence by Note.—A note, attached to a declaration, and shown to have been executed in extension of an account, for which the separate estate of the debtor's wife was also liable, and in acknowledgment of the amount due thereon, will be treated as an account stated, and is admissible in an action against the wife to prove the amount due.—MCCORMICK v. ATTMEAVE, Miss., 19 South. Rep. 198.

3. APPEAL — Absconding Debtor.—Under Mill. & V. Code, § 4192, subsec. 4, providing for an attachment where a debtor intentionally conceals himself to avoid legal process, the question of such intent is one of fact, and the finding thereon of the court of chancery appeals will not be reviewed.—FARMERS' & TRADERS' BANK v. EVANS, Tenn., 34 S. W. Rep. 2.

4. APPEAL—Error — Election.—Where a case is presented for review to this court within the time allowed in which to perfect an appeal, but a petition in error is filed therewith, the party bringing the case here will be presumed to have elected the remedy by error, and the case will be so considered.—CHILDERSON v. CHILDERSON, Neb., 66 N. W. Rep. 281.

5. APPEAL — Supplementary Proceedings.—An order made on supplementary proceedings, declaring that a third person, who was made a party, was indebted to the execution defendant and requiring him to pay plaintiff's judgment from the first money due on such debt, was a final judgment, from which an appeal will lie.—HARPER v. BEHAGG, Ind., 42 N. E. Rep. 1115.

6. ASSIGNMENT FOR BENEFIT OF CREDITORS—Invalidity.—An assignee for benefit of creditors under a void assignment has no title to the property assigned, and cannot maintain replevin against the sheriff seizing it under attachment.—MOSCONI v. BUNCHINELL, Colo., 43 Pac. Rep. 912.

7. ASSIGNMENT FOR BENEFIT OF CREDITORS—Validity.—An assignment is not void for preferring certain creditors where the deed of assignment expressly states that the assignee shall pay claims to creditors "according to the true amounts legally due them."—GOODBAR SHOE CO. v. MONTGOMERY, Miss., 19 South. Rep. 196.

8. ASSIGNMENT FOR CREDITORS—Filing Notice—Lien.—An attachment lien is an incumbrance, within Sess. Laws 1885, p. 43, making the filing of a deed of general assignment in a county where real estate conveyed by the deed is situated constructive notice to a purchaser or incumbrancer of the transfer.—SPANGLER v. WEST, Colo., 43 Pac. Rep. 905.

9. ATTACHMENT — Affidavit.—An affidavit for an attachment, setting forth the grounds therefor in the language of the statute, is sufficient.—BURNHAM v. RAMGE, Neb., 66 N. W. Rep. 277.

10. ATTACHMENT — Claim by Third Person.—On a claim in attachment by a third person, there was evidence of a debt from defendant to another corporation, and from the latter to claimant. The books of such corporation showed that defendant was credited with payment of its debt by delivery to claimant of the pig iron attached. It was shown that the iron was delivered to claimants under such agreement for payment, and that claimant was in possession thereof for over a month prior to the levy thereon: Held, that the property was not subject to the attachment.—MARY LEE COAL & RAILWAY CO. v. KNOX, Ala., 19 South. Rep. 67.

11. ATTACHMENT—When Authorized.—Under Sand. & H. Dig. § 325, subd. 6, authorizing the issuance of an attachment when a debtor has removed property from the State, not leaving enough to satisfy the claims of his creditors, the value of the property left is to be determined by its fair market value, and not by what it would bring at forced sale.—NESBIT v. SCHWAB CLOTHING CO., Ark., 34 S. W. Rep. 79.

12. ATTACHMENT — Wrongful Attachment—Joint and Several Liability.—Creditors, acting separately and without concert, though simultaneously, sued out attachments, which were simultaneously levied on property which they were justified in believing had been transferred by their common debtor in fraud of their rights; and, having each indemnified the sheriff, sold the property, and applied the proceeds in payment of their respective demands. The purchaser from the debtor, in an action on the indemnifying bond of one of the attaching creditors, recovered damages for the wrongful taking and sale of the attached property: Held, that the levy of the several attachments was a single tort, and therefore constituted a single cause of action, for which the attaching creditors were jointly and severally liable.—VANDIVER v. POLLAK, Ala., 19 South. Rep. 180.

13. ATTORNEY AND CLIENT — Evidence.—In an action by attorneys for professional services, defendant, if not an attorney, is not a competent witness to testify as to the value of plaintiff's services, though he has employed and settled with other attorneys, and knew what their charges were in other cases.—HOWELL v. SMITH, Mich., 66 N. W. Rep. 218.

14. ATTORNEY'S LIEN—Setting off Judgments.—An attorney's lien is so far subject to the equities arising out of and existing between the parties to an action that a judgment on appeal for costs against the plaintiff may be set off *pro tanto* against a similar judgment in the same action in plaintiff's favor, without regard to such lien of the attorney.—LINDSAY v. PETTIGREW, S. Dak., 66 N. W. Rep. 321.

15. BAILMENT—Action by Bailee.—A bailee may sue a third person for injury to the property.—BAGGETT v. MCCORMICK, Miss., 19 South. Rep. 89.

16. BENEVOLENT ASSOCIATIONS—Submission of Grievances.—Members of fraternal benevolent associations may lawfully agree, as part of their scheme of organization, to submit their domestic grievances in the first instance to the internal tribunals of their order, and, having so agreed, cannot, against the protest of the association, maintain a civil action against it, until the condition precedent has been, in legal contemplation, complied with.—STATE v. SMITH, N. J., 33 Atl. Rep. 849.

17. BILL OF EXCEPTIONS—Authentication.—A bill of exceptions in a cause tried in the district court must be authenticated by the certificate of the clerk of such court, to entitle it to be considered in the supreme court.—ROMBERG v. FOKKEN, Neb., 66 N. W. Rep. 282.

18. BILL OF EXCEPTIONS—Authentication.—In the absence of a certificate of the clerk of the district court authenticating the bill of exceptions, it will be presumed that every essential averment in the petition not negatived by the verdict, was proven, and that the instructions refused were properly denied.—ROMBERG v. HEDIGER, Neb., 66 N. W. Rep. 283.

19. BILL OF EXCEPTIONS — Time for Preparing.—Where a trial has been had and a motion for a new trial sustained, the time for preparing a bill of exceptions embodying the evidence on that trial is fixed at the latest, by the term at which the motion for a new trial was sustained, and not by the term at which final judgment was rendered, or at which a new trial was had, or a new trial after such second trial denied.—STATE v. AMBROSE, Neb., 66 N. W. Rep. 306.

20. BUILDING AND LOAN ASSOCIATIONS — Usury.—An applicant for a loan from a building and loan association was informed by the association that he must become a member to secure the loan, and subscribed for stock in order to secure the loan, and not as an investment. In consideration of a loan of $450, he gave his note for $500, due in five years, and contracted to pay $4.17 interest per month and $6 as dues: Held, that the contract was usurious, the legal rate being 12 per cent.—PEOPLE'S BUILDING, LOAN & SAVINGS ASS'N v. RISING, Tex., 34 S. W. Rep. 147.

21. CARRIERS—Contract for Shipment of Freight.—A shipper of freight who signs a contract of shipment in the absence of fraud or deceit, is conclusively presumed to know its contents and to have assented thereto.—KELLERMAN v. KANSAS CITY, ST. J. & C. B. R. CO., Mo., 34 S. W. Rep. 41.

22. CARRIERS — Injuries to Baggage.—A carrier of passengers is not liable to a firm for injuries done to an article belonging to the firm, but carried by the carrier as the personal baggage of a passenger, although the passenger was a member of the firm.—STATE v. KNIGHT, N. J., 33 Atl. Rep. 845.

23. CARRIERS—Injuries — Pleading—Amendment.—In a suit for personal injuries the petition alleged that defendant's train was derailed because of a defective track and road-bed. In an amendment it was alleged that the train was derailed because of a defective axle of the tender: Held, that the negligent derailment of the train was the act complained of, and the amendment did not set up a new cause of action.—TEXAS & P. RY. CO. v. BUCKALEW, Tex., 34 S. W. Rep. 164.

24. CARRIERS — Live-stock Shipment — Evidence.—In an action for delay in a stock shipment, error in allowing the owners of the stock, who had no personal knowledge of the weight of the animals, or of the sales made, to testify as to such matters by referring to accounts submitted by their commission merchants, which had not been introduced in evidence, was not cured by a subsequent offer to put such accounts in evidence, where it appeared that the court rejected the offer on the ground that the accounts were not properly verified.—GULF, C. & S. F. RY. CO. v. FROST, Tex., 34 S. W. Rep. 166.

25. CARRIERS—Live-stock Shipments — Limiting Liability.—A carrier cannot, by contract, limit its liability for injury to live stock to such injuries as are caused by gross negligence.—BALTIMORE & O. S. W. RY. CO. v. RAGSDALE, Ind., 42 N. E. Rep. 1106.

26. CARRIERS — Penal Statute—Negligence.—Rev. St. U. S. § 4386, requiring railroad companies, under a penalty imposed, payable to the United States, to unload animals shipped, at stated periods, for rest, food, and water, gives to a shipper whose animals are injured by failure of the company to do so a cause of action enforceable in a State court.—CHESAPEAKE & O. RY. CO. v. AMERICAN EXCH. BANK, Va., 23 S. E. Rep. 925.

27. CARRIERS OF PASSENGERS—Railroad Companies.—One who, through collusion with the conductor of a railway train, is riding for less than the required fare, cannot recover damages from the railway company for injuries received by being ejected while the train is in motion.—WILLIAMS V. MOBILE & O. R. CO., Miss., 19 South. Rep. 90.

28. CARRIERS OF GOODS—Express Company.—Where plaintiff, on a certain day, expected a package by express at a place where it was customary for consignees to call for packages upon notice of their arrival, and plaintiff, in the evening of the same day, and in time to receive the same, was notified of the arrival of said package, but directed the express company to retain the package until the next day, and it was stolen that night without fault on the part of the company, the company is not liable for its loss.—SOUTHERN EXP. CO. V. HOLLAND, Ala., 19 South. Rep. 66.

29. CERTIORARI—Removal and Appointment of Officer.—*Certiorari* does not lie to review the action of the board of trustees of a city declaring vacant the office of city marshal, and appointing a person to fill the same.—LORBEER V. HUTCHINSON, Cal., 43 Pac. Rep. 896.

30. CHATTEL MORTGAGE — Acceptance—Evidence.—That a mortgagee was, after the execution and filing of a chattel mortgage, informed thereof, and authorized her attorney to take possession of the property, is a sufficient acceptance of the mortgage, as against other creditors of the mortgagor subsequently attaching the property.—LOUDEN V. VINTON, Mich., 66 N. W. Rep. 222.

31. CHATTEL MORTGAGES—Description of Property.—A chattel mortgage sufficiently describes the property as the entire stock of merchandise in a certain store, giving the lines of goods, it appearing that nothing was added to the stock after the giving of the mortgage.—DILLON V. DILLON, Wash., 43 Pac. Rep. 894.

32. CHATTEL MORTGAGE — Recording. — Where the plaintiff in an action in replevin claims the right of possession under and by virtue of a certain chattel mortgage, and it is admitted that the property covered by said mortgage remained in the possession of the mortgagor, it is necessary for the plaintiff to establish the fact that such chattel mortgage was on file in the office of the register of deeds of the proper county at the time an attaching creditor levied upon such goods, in order to impart validity to such chattel mortgage as against an attaching creditor without actual notice.—GRIFFIS V. WHITSON, Kan., 43 Pac. Rep. 813.

33. CHATTEL MORTGAGE—Sufficiency of Description.—A deed of trust describing the property mortgaged as the crops to be raised by the grantor, during a certain season, "on lands" in a certain county "leased from" a certain person by the grantor, sufficiently describes the property subject to the mortgage.—WETLIN V. MOUNT, Miss., 19 South. Rep. 201.

34. CONDEMNATION PROCEEDINGS—Estoppel to Question Validity.—A landowner, who has accepted and retained a sum awarded in condemnation proceedings, is estopped from questioning the validity of the proceedings.—HOLLAND V. SPELL, Ind., 42 N. E. Rep. 1014.

35. CONSTITUTIONAL LAW — Interstate Commerce—Rates of Freight.—Sayles' Civ. St. art. 4258*a*, § 3, provides that no railway company in the State shall charge for the transportation of any freight a greater sum than is specified in the bill of lading, and any railway company refusing to deliver freight to the consignee on payment or tender of the charges stated in the bill of lading shall be liable to a penalty equal to the amount of such charges for each day's delay: Held, that such statute is inconsistent with the provisions of the interstate commerce act requiring railway companies engaged in interstate commerce, under the penalties prescribed, to charge and collect the rates of freight specified in the published tariff schedule, and is therefore void as to interstate shipments of freight.—ST. LOUIS S. W. RY. CO. OF TEXAS V. CARDEN, Tex., 34 S. W. Rep. 145.

36. CONSTITUTIONAL LAW—Itinerant Peddlers—License Tax.—A city ordinance requiring all transients, other than citizens of the city, selling goods of any kind within the city, to pay a license tax, and in default thereof be imprisoned or fined, is, when applied to citizens of other States, a violation of Const. U. S. art. 4, § 2, providing that the citizens of each State shall be entitled to all the privileges of citizens of the several States.—MCGRAW V. TOWN OF MARION, Ky., 34 S. W. Rep. 18.

37. CONTRACT — Assignment.—By contract between P and M the former purchased all the hemlock bark growing on M's land, and, in consideration therefor, agreed to convey to M certain other land, reserving to himself, however, the hemlock bark growing thereon. After executing and delivering to M a deed containing the same reservation as to the bark as was contained in the original contract, P assigned such contract to a third person, describing it as a contract between M and P "for the sale and removal from the lands therein described of the hemlock bark thereon:" Held, that the assignee thereby acquired title only to the bark growing on M's land, and not to that on the land conveyed by P to M.—SCHOONMAKER V. HOYT, N. Y., 42 N. E. Rep. 1059.

38. CONTRACT — Conditional Sale.—A enters into a contract with B, by the terms of which A agrees to furnish some new machinery, and put it with the old machinery already in the mill of B, and is to remodel said mill, and guaranties to change it so that it will do certain things. B agrees, when the mill fulfills the guaranty of A, to accept and settle for it: Held, that B is not bound to accept and settle for it, and is not in default in the payments contracted for, until it fulfills the guaranty.—RICHARDSON V. GREAT WESTERN MANUF'G CO., Kan., 43 Pac. Rep. 809.

39. CONTRACT — Consideration. — A promise to the parents to pay their child a certain sum in consideration of the privilege of naming the child is a good consideration for a note given to the child by the promisor, so as to enable the child, the parents having surrendered to the child all rights therein, to recover thereon.—EATON V. LIBBEY, Mass., 42 N. E. Rep. 1127.

40. CONTRACT—Consignments.—A contract between manufacturer and dealer, whereby the dealer agrees to sell vehicles shipped to him, and remit to the manufacturer all notes and cash received therefor, and to guaranty the payment of the notes so taken, and which reserves to the manufacturer the ownership of the vehicles until settlement is made, with the right to cancel the contract or withdraw any of the "jobs" at his pleasure, and which provides that the manufacturer shall ascertain and set apart the dealer's commissions, and may, at the end of the year, have the unsold vehicles stored by the dealer, subject to the manufacturer's order, is a contract of consignment, and not one of sale.—MILBURN MANUF'G CO. V. PEAK, Tex., 34 S. W. Rep. 102.

41. CONTRACT — Construction — Mutuality.—Plaintiff had been manufacturing tin cans for defendant for some time at an agreed price, when defendant wrote to plaintiff that he would take his entire output of cans if he would agree not to sell to a certain other person, and directing plaintiff to enter his order for a certain number of cans "as heretofore." Plaintiff accepted the proposition, and shipped cans which were paid for at the price theretofore agreed upon: Held, that the contract was not invalid for failure to definitely fix the price to be paid for the cans.—WALSH V. MYERS, Wis., 66 N. W. Rep. 250.

42. CONTRACT—Damages.—The measure of damages for breach of contract on the part of the buyer to purchase an article to be manufactured by the seller, for which there was no market value, the seller having desisted from manufacturing the article after notice from the buyer of his repudiation of the contract, is the difference between the contract price and the cost of production, and not the difference between the contract price and the price at which the seller at the time

of the breach was enabled to effectuate sales thereof. —TODD v. GAMBLE, N. Y., 42 N. E. Rep. 982.

43. CONTRACT—Rescission — Fraud.—A rescission of the contract for the purchase of land, and the cancellation of the conveyances, on the ground that the representations of the vendor were false and fraudulent, is an extraordinary power of equity, and should not be exercised unless it is clearly established that the representations were false or fraudulent, and that they were relied on by the purchaser, and the right to disaffirm the contract must be exercised promptly after the discovery of the fraud.—WOOD v. STAUDENMAYER, Kan., 43 Pac. Rep. 760.

44. CONVERSION—What Constitutes.—That an officer forecloses a chattel mortgage, invalid as against an attaching creditor of the mortgagor, for failure to record the same, the possession of the property being in no way interfered with by the officer or purchaser at the foreclosure sale, does not constitute a conversion, as against the attaching creditor.—THORP v. ROBBINS, Vt., 33 Atl. Rep. 896.

45. CORPORATIONS — Annual Report. — In action against the trustees of a corporation, under Comp. St. div. 5, § 460, making the trustees liable for corporate debts unless they file, "in the office of the clerk of the county where the business of the company is carried on," a report, stating the amount of capital, etc., the complaint is bad, if it fails to state in what county the business of the corporation was carried on. — WETHEY v. KEMPER, Mont., 43 Pac. Rep. 716.

46. CORPORATIONS—Certificates of Stock — Negotiability.—The character of complete negotiability does not attach to stock certificates so as to make a transfer to a *bona fide* purchaser equivalent to actual title, though there was no agency in the transferror, and the certificate had been lost without fault of the true owner, or had been obtained by theft or robbery; and the owner of a stock certificate, lost without his negligence, or stolen, has the right to reclaim it from the hands of one into whose possession it subsequently comes, though a *bona fide* holder.—KNOX v. EDEN MUSEE AMERICAIN CO., N. Y., 42 N. E. Rep. 988.

47. CORPORATION—Contracts — Validity.—A contract between two corporations will not be declared invalid because the corporations have common directors, where its fairness is manifest.—EVANSVILLE PUBLIC HALL CO. v. BANK OF COMMERCE, Ind., 42 N. E. Rep. 1098.

48. CORPORATIONS — Contracts with Promoters.—A corporation will be bound by contracts made on its behalf by its promoters before organization, if, after it is organized, with full knowledge of all the facts, it assumes the contract, and agrees to pay the consideration, or accepts and retains the benefits.—SCHREYER v. TURNER FLOURING MILLS CO., Oreg., 43 Pac. Rep. 719.

49. CORPORATIONS — Corporate Obligations—Use by Officers.—One who takes corporate bonds from officers of the corporation to secure their private indebtedness is bound to ascertain their right to dispose of the bonds.—GERMANIA SAFETY VAULT & TRUST CO. v. BOYNTON, U. S. C. C. of App., 71 Fed. Rep. 797.

50. CORPORATIONS — Indictment of Turnpike Company.—Under Mill. & V. Code, § 5347, providing that when the performance of any act is prohibited by statute, and no penalty for the violation of the statute is imposed, the doing of the prohibited act is a misdemeanor, a turnpike company, though operating under a special charter, may be indicted for collecting tolls contrary to a provision in its charter.—NASHVILLE & D. R. R. TURNPIKE CO. v. STATE, Tenn., 34 S. W. Rep. 4.

51. CORPORATIONS — Insolvency — Corporate Existence.—Where a corporation, when founded, assumes the debts of the partners theretofore carrying on the business, that the partners afterwards gave their notes for such indebtedness does not relieve the corporation from liability therefor, so as to prevent a preference thereof by the corporation.—JOHNSTON v. GUMBEL, Miss., 19 South. Rep. 100.

52. CORPORATIONS — Insolvent Corporations — Receiver.—The receiver of an insolvent corporation, appointed in proceedings under Gen. St. 1894, § 5897, may maintain an independent action to enforce the collection of the amount of a call on unpaid subscriptions made by the board of directors in accordance with the by-laws, and due and payable prior to the commencement of the proceedings which resulted in the appointment of the receiver.—BASTING v. ANKENY, Minn., 66 N. W. Rep. 266.

53. CORPORATIONS—Liability for Fraud of Officers.—A bank, to which real property has been conveyed by an officer of the bank, in his individual capacity, for its full value, incumbered by a mortgage executed by such bank officer in his individual capacity, and to which such bank is in no manner a party, is not liable to the mortgagee for a loss sustained by him, because of worthless securities received by him in exchange for a discharge of such mortgage, where such securities were the individual property of such bank officers, and such discharge was obtained by such bank officers in their individual capacities, and not as officers of the bank.—STAPLES v. HURON NAT. BANK, S. Dak., 66 N. W. Rep. 314.

54. CORPORATIONS—Misnomer—Amendment.—Where suit is brought against a corporation, correctly describing it, and correctly naming its agents, and its attorneys defend without a plea in abatement, and the evidence clearly identifies the defendant, an amendment to the petition, correcting a misnomer of defendant, is properly allowed.—SOUTHERN PAC. CO. v. GRAHAM, Tex., 34 S. W. Rep. 135.

55. CORPORATIONS — Officers—Authority to Execute Note.—The authority of the president and secretary of a business corporation to execute notes of such corporation will not be presumed from the mere fact that they have exercised it.—CITY ELECTRIC ST. RY. CO. v. FIRST NAT. EXCH. BANK, Ark., 34 S. W. Rep. 89.

56. CORPORATIONS — Receiver.—Where officers of a corporation, knowing its insolvency, in bad faith resist application made, on the ground of insolvency, for its dissolution and appointment of a receiver, allowance cannot be made to its attorneys for services in resisting the application, though they acted in good faith.—PEOPLE v. COMMERCIAL ALLIANCE LIFE INS. CO., N. Y., 42 N. E. Rep. 1044.

57. COURTS—Attorney as Judge—Agreement of Parties.—An attorney cannot be empowered by the district court or by the parties to preside as judge at a trial, or exercise judicial authority in the case.—MCGARVEY v. HALL, Colo., 43 Pac. Rep. 909.

58. CRIMINAL EVIDENCE — Cross examination as to Character.—On the cross-examination of witnesses, to prove the good character of the accused for peace and quietness, they may be asked if they had not heard particular acts of violence imputed to the accused. Reputation is derived from what people generally say of the party whose character is the subject of investigation, and the witness, testifying to the good he has heard of the party, may be asked, on the cross-examination, if he has not also heard evil conduct attributed to the party.—STATE v. PAIN, La., 19 South. Rep. 138.

59. CRIMINAL EVIDENCE—Proof of Handwriting.—Unless writings are in evidence in the case, and are admitted to be the genuine handwriting of the party, they cannot be admitted for the purpose of proving the handwriting of such party.—STATE v. THOMPSON, Mo., 34 S. W. Rep. 31.

60. CRIMINAL EVIDENCE—Homicide—Insanity—Expert Witnesses.—A physician cannot testify as to the sanity of accused, his opinion being based on statements made to him by accused after the homicide which are not in evidence.—PEOPLE v. STRAIT, N. Y., 42 N. E. Rep. 1045.

61. CRIMINAL EVIDENCE—Res Gestæ.—In a prosecution for murder, exclamations by deceased and witnesses of the homicide as defendant approached the house in which the difficulty accrued, and which he

had just left, that "there he comes with a gun," are admissible as *res gestæ*.—STATE v. BIGGERSTAFF, Mont., 43 Pac. Rep. 709.

62. CRIMINAL EVIDENCE—Res Gestæ.—Acts and declarations of participants in a transaction constitute parts of the *res gestæ*, and proof of same is admissible.—STATE v. FONTENOT, La., 19 South. Rep. 111.

63. CRIMINAL LAW—Bigamous Cohabitation—Indictment.—An indictment under Pub. St. ch. 244, § 1, providing that every person who shall be convicted of being married to another, or of cohabitating with another as husband and wife, having at the time a former husband or wife living, shall be imprisoned, etc., failing to allege the existence of a second marriage, is fatally defective.—IN RE WATSON, R. I., 33 Atl. Rep. 873.

64. CRIMINAL LAW—Competency of Jury.—That a jury was ordered and summoned to attend at a civil term of the district court in one of the parishes of the State, whereat the grand jury who found the indictment against the defendant and the petit jury who tried and convicted him were selected and organized, is not ground for new trial or arrest of judgment.—STATE v. DICKERSON, La., 19 South. Rep. 140.

65. CRIMINAL LAW—Gaming—Pool Table.—Under Pen. Code, arts. 358, 364, prohibiting the exhibition of gaming tables, and betting at any such table, it was an offense to play at a pool table where the loser in each instance paid the table fees, though there was no express understanding between the players that he would do so.—HALL v. STATE, Tex., 34 S. W. Rep. 122.

66. CRIMINAL LAW—Grand Jury—Number of Jurors.—Under Const. art. 5, § 13, providing that grand juries shall be composed of twelve men, a body composed of more than twelve men is not a grand jury.—EX PARTE REYNOLDS, Tex., 34 S. W. Rep. 120.

67. CRIMINAL LAW—Indictment—Charging Offenses Conjunctively.—Under Pen. Code, § 218 (St. 1891, p. 283), making it felony for any person to throw out a switch, etc., with intent to derail any train, or board any train with intent to rob it, etc., an indictment charging defendant with throwing a switch with intent to derail a passenger train, "and" boarding a passenger train with intent to rob the same, and not specifically showing that the two acts were directed against the same train, was not bad for duplicity, it being inferable from the indictment that they were directed against the same train, and the case having been tried on that assumption.—PEOPLE v. THOMPSON, Cal., 43 Pac. Rep. 768.

68. CRIMINAL LAW—Indictment—Impeachment by Grand Juror.—A member of the grand jury cannot be permitted to impeach its finding by testifying that he, as a witness before that body to support the indictment, was not sworn.—STATE v. COMEAU, La., 19 South. Rep. 130.

69. CRIMINAL LAW—Instructions—Weight of Evidence.—A charge that "a confession freely and voluntarily made is among the best evidence known to the law, and if the jury believe from the evidence that defendant did make such a confession, they are authorized to consider this in connection with the other evidence," was erroneous as a charge on the weight of the evidence.—THOMPSON v. STATE, Miss., 19 South. Rep. 204.

70. CRIMINAL LAW—Killing Diseased Animals.—Rev. St. 1894, § 2164 (Rev. St. 1881, § 2070), provides that whoever kills, for the purpose of sale, a sick, diseased, or injured animal, or who sells, or has in his possession with intent to sell the meat of any such animal, shall be fined, etc.: Held, that an information for killing diseased animals for the purpose of selling for food need not state that the meat was to be sold within the State.—MOESCHKE v. STATE, Ind., 42 N. E. Rep. 1029.

71. CRIMINAL LAW—Larceny—Indictment.—Pen. Code, § 52, provides that if any person steal certain animals named, "of any value," he shall be imprisoned in the penitentiary not more than 10 nor less than 1 year, or, in the discretion of the court, be imprisoned in the county jail not exceeding 1 year, or fined not exceeding $100, or both: Held, that an indictment under such statute need not state the value of the cattle alleged to have been stolen.—STATE v. YOUNG, Wash., 43 Pac. Rep. 881.

72. CRIMINAL LAW—Prize Fighting.—Not all physical contests for a prize or reward are punishable, under the statute, as prize-fights. The contest must be a fight, and there must be an intent on the part of the contestants to do violence to, and inflict some degree of bodily harm on, each other.—STATE v. PURTELL, Kan., 43 Pac. Rep. 782.

73. CRIMINAL LAW—Seduction—Indictment.—A female under 10 years of age is not the subject of seduction, since she is incapable of consent, under Code, § 1281; and an indictment for seduction is not insufficient which fails to aver that the female alleged to have been seduced was over 10 years of age.—CARLISLE v. STATE, Miss., 19 South. Rep. 207.

74. CRIMINAL LAW—Uttering Forged Deed.—An indictment, under Cr. Code 1886, § 3852, for uttering a forged deed with intent to defraud, is sufficient, if in the prescribed form, and pursuing the language of the statute, without an averment that defendant uttered said deed, knowing the same to be false or forged.—ESPALLA v. STATE, Ala., 19 South. Rep. 82.

75. CRIMINAL PRACTICE—Indictment—Description of Offense.—Under St. § 1960, creating the separate offense of aiding and assisting in setting up a machine ordinarily used for betting, it is essential that an indictment clearly aver facts showing that the machine was set up, and the principal offense committed.—COMMONWEALTH v. LANSDALE, Ky., 34 S. W. Rep. 17.

76. CRIMINAL PROCEDURE—Sentence.—Where a verdict of conviction, assessing the punishment at fine and imprisonment, was erroneous as to the latter, in assessing a term less than that prescribed by statute, as a result of misdirection by the court, the verdict was not avoided in whole, as being outside the statute.—STATE v. ARNOLD, Ind., 42 N. E. Rep. 1095.

77. CRIMINAL TRIAL—Impeachment—Witness.—One cannot, on the ground of surprise, discredit his own witness by proof of contradictory statements previously made by him, where he has not shown that his witness ever told him she would testify she made the statements he desired to prove she had made, or that she ever, in fact, made the statements.—STAIE v. BURKS, Mo., 34 South. Rep. 48.

78. DEATH BY WRONGFUL ACT—Survival of Cause of Action.—Under Code 1892, § 1916, providing that a cause of action for injuries causing death shall survive to the personal representative, if deceased could have sued in case the injuries had not been fatal, no action survives to the personal representative if death was instantaneous.—MCVEY v. ILLINOIS CENT. R. CO., Miss., 19 South. Rep. 209.

79. DEED—Bona Fide Purchaser.—A recorded deed, in which the courses, distances, and monuments, together with the corners and witnesses thereto, and the locations, are given as in an official survey, so as to furnish the means of identifying the tract intended to be conveyed is notice to a subsequent purchaser, though, by mistake, the land is described as lying in the "northwest," instead of the "northeast," quarter of the section.—FRICK v. GODARE, Ind., 42 N. E. Rep. 1015.

80. DEED—Building Restrictions.—Violation of a provision in a deed that no store or saloon should be erected on the lot, but that it should be kept for dwelling-house purposes only, will be enjoined, though prior to the deed the grantor had leased a store opposite for a saloon, and thereafter conveyed adjoining lots without any restrictions, it appearing that such other deeds were pursuant to contracts made long before, and that the property conveyed with the restrictions had been purchased by such grantor to prevent the erection of a saloon there, and to protect his store

on the next corner and his residence property in the next block from being depreciated by proximity of a saloon.—REILLY v. OTTO, Mich., 66 N. W. Rep. 228.

81. DEED — Construction — Exceptions.—The exception of "the taxes assessed for the year 1893" from the covenant in a deed against incumbrances did not include an assessment for the construction of a sewer.—SMITH v. ABINGTON SAV. BANK, Mass., 42 N. E. Rep. 1133.

82. DEED—Constructive Delivery.—Where a mother executes a deed to her son, and voluntarily places the same upon record for the purpose and with the intent of passing title to the grantee, actual manual delivery and formal acceptance are not essential to the validity of the conveyance.—ISSITT v. DEWEY, Neb., 66 N. W. Rep. 288.

83. DEED—Grant of Water Right.—A grant of right to use a certain quantity of water, from a designated pond or small lake, "for the purpose of carrying on" certain works situated on a natural stream constituting the outlet of such pond, such right to cease when the grantor's furnace should be in operation, does not limit the use of the water to the particular works operated by the grantee at the time; but a person succeeding to the grantee's rights may use such quantity of water to operate different works.—HALL v. STERLING IRON & RAILWAY CO., N. Y., 42 N. E. Rep. 1057.

84. DEED — Nature of Estate.—A conveyance of land by the words, "give grant, bargain, sell, convey, and confirm" to a railroad corporation, and to its successors and assigns, forever, for the purpose of extending its railroad, and as part of the route thereof, creates in the grantee a fee, limited to the purpose and use indicated.—BRECKINRIDGE v. DELAWARE, L. & W. R. CO., N. J., 33 Atl. Rep. 800.

85. DIVORCE—Decree.—A woman was twice married, and, having heard that her first husband was living, began proceedings to obtain a divorce from him. The proceedings were *ex parte*, defendant, having been served with summons by publication, and a decree was entered as prayed: Held, that the proceedings were strictly *in rem*, and determined only that plaintiff was no longer the wife of defendant, and did not determine that defendant was then living, and that she was his wife at the time of entering the decree.—HUNTER v. HUNTER, Cal., 43 Pac. Rep. 756.

86. DRAINAGE — Damages — Benefits.—The damages referred to in Rev. St. 1894, § 5660 (Rev. St. 1881, § 4290), in relation to drainage, which shall be assessed "to the parties owning the lands benefited, in proportion as each tract of land is assessed for benefits," means the actual damages, if any, after deducting the benefits.—WILSON v. TALLEY, Ind., 42 N. E. Rep. 1009.

87. EASEMENT—Light and Air.—When a parcel of land held in common is severed into two tracts by quitclaim deeds simultaneously interchanged by the tenants in common, and there is a store on one of the two lots, with a window through which light and air is received across the other lot, such window cannot be closed by the owner of the latter lot if the influx of light and air is reasonably necessary to the beneficial enjoyment of the store.—GREER v. VAN METER, N. J., 33 Atl. Rep. 794.

88. ESTOPPEL IN PAIS.—To constitute an estoppel *in pais*, the person sought to be estopped must have conducted himself with the intention of influencing the conduct of another, or with reason to believe his conduct would influence the other's conduct, inconsistently with the evidence he proposes to give.—BURKE v. UTAH NAT. BANK, Neb., 66 N. W. Rep. 295.

89. EVIDENCE—Action against City—Mortality Tables.—In an action for injuries not resulting in death, mortality tables are admissible, provided they are accompanied by proper instructions in regard to their use.—CAMPBELL v. CITY OF YORK, Penn., 33 Atl. Rep. 879.

90. EVIDENCE—Negligence of Master.—In an action by an employee against his employer for personal injuries caused by defendant's negligence in failing to station a watchman at an uncovered trench in which plaintiff was working, evidence of what was usually done at other places, and under different circumstances, as to guarding such trenches, was properly excluded.—CRAVEN v. MAYERS, Mass., 42 N. E. Rep. 1131.

91. EVIDENCE—Parol Evidence — Surety.—Parol evidence is admissible to show that a joint maker of a note signed as surety, though that fact does not appear upon the note.—KENDALL v. MILLIGAN, Ark., 34 S. W. Rep. 78.

92. EXECUTION—Exemptions—Watch.—Under section 5127, Comp. Laws, which makes absolutely exempt "all wearing apparel and clothing of the debtor and his family," a watch owned by the debtor, and which he has carried constantly for three years, is absolutely exempt, as wearing apparel.—BROWN v. EDMONDS, S. Dak., 66 N. W. Rep. 310.

93. EXECUTION — Supplementary Proceedings — Insolvent Corporation.—The act of March 15, 1893 (Laws 1893, p. 435), providing for the citing and examination of judgment debtors in aid of execution, does not authorize such proceeding in an action against an insolvent corporation for which a receiver has been appointed, there being no authority for the issuance and enforcement of an execution against the property of such corporation in behalf of a single creditor.—ALLEN v. STALLCUP, Wash., 43 Pac. Rep. 884.

94. EXECUTION SALE—Conflict of Jurisdictions.—Appointment of a receiver by a federal court, in a suit commenced therein after commencement in a State court of an action to enforce a mechanic's lien, will not affect the lienholder's right to sell the property on special execution under the lien judgment rendered in his action.—ROGERS & BALDWIN HARDWARE CO. v. CLEVELAND BLD'G CO., Mo., 34 S. W. Rep. 57.

95. EXTRADITION—Fugitive from Justice.—A fugitive from justice, surrendered by one State upon the demand of another, may, notwithstanding his objection, be prosecuted by the latter for any extraditable offense committed within its borders, without first having had an opportunity to return to the State by which he was surrendered.—IN RE PETRY, Neb., 66 N. W. Rep. 308.

96. FEDERAL COURTS—Jurisdiction—Diverse Citizenship.—In order to confer jurisdiction of a suit on a chose in action on the federal court, on the ground of diverse citizenship, the bill must show the plaintiff's assignor resided in another State.—BENJAMIN v. CITY OF NEW ORLEANS, U. S. C. C. (La.), 71 Fed. Rep. 758.

97. FEDERAL COURTS—Mandamus—Power of Circuit Courts of Appeal.—The circuit courts of appeal have no power to issue a *mandamus* directing a circuit court to dismiss a case *in limine*, on the ground that no jurisdiction has been acquired over the defendant by the method of service pursued, for the circuit court of appeal can only issue a *mandamus* in aid of their own jurisdiction (Act March 3, 1891, § 12 Rev. St. § 716); and they have no jurisdiction in a case in which the only question involved is the jurisdiction of the court below, as such cases are reviewable on appeal only in the supreme court (Act March 3, 1891, §§ 5, 6).—UNITED STATES v. SEVERENS, U. S. C. C. of App., 71 Fed. Rep. 768.

98. FRAUDS, STATUTE OF—Agreement for Sale of Personalty.—An oral contract to manufacture and furnish the iron work for a building is not an agreement relating to a sale of personalty, within the statute of frauds, where such iron work is not in existence at the date of the contract.—HEINTZ v. BURKHARD, Oreg., 43 Pac. Rep. 866.

99. FRAUDS, STATUTE OF—Memorandum.—Where an agent was duly authorized in writing to sell certain property, at specified terms, to a particular person, whose name did not appear, and the agent in acknowledgment of a deposit on the purchase price, executed a receipt to said person, setting out her name, both writings constitute a sufficient memorandum of sale to satisfy the statute of frauds.—WHITE v. BREEN, Ala., 19 South. Rep. 59.

100. FRAUDULENT CONVEYANCES. — The fact that a mortgage is executed for a sum materially greater than the actual amount of indebtedness is only a badge of fraud, and does not render the instrument void *per se*.—ADAMS v. LAUGEL, Ind., 42 N. E. Rep. 1017.

101. FRAUDULENT CONVEYANCES—Change of Possession.—Where the goods remained with the seller, the sale was fraudulent, as against his existing creditors, though, prior to a levy by them, the buyer removed a portion of the goods.—AUTREY v. BOWEN, Colo., 43 Pac. Rep. 908.

102. FRAUDULENT CONVEYANCE—Evidence.—Where a sale of a stock of goods is alleged to have been fraudulent as to creditors, the purchaser may be asked, and allowed to answer, as a witness in his own behalf, whether he had any knowledge or notice that his vendor was selling the goods with intent to hinder, delay and defraud his creditors.—RICHOLSON v. FREEMAN, Kan., 43 Pac. Rep. 772.

103. FRAUDULENT CONVEYANCES — Knowledge of Grantee.—A creditor purchasing property from a failing debtor will be affected by the intent of the latter to defraud his other creditors, where he shares that intent, and aids in giving effect to it; and the transaction will not stand as to the other creditors, whatever may be its effect between the immediate parties.—MARTIN v. ESTES, Mo., 34 S. W. Rep. 53.

104. FRAUDULENT CONVEYANCE—Stock — Trade— Possession.—A deed of trust of land and a stock in trade is void as to creditors where the grantors are allowed by oral agreement to retain possession of the stock, and use the same in continuing the business.—BANK OF HAZELHURST v. GOODBAR, Miss., 19 South. Rep. 204.

105. GIFT—Express Trust.—An entry on the books of a savings bank in the name of a donor, "in trust for the donee," is not conclusive evidence, by itself, of an absolute, indisputable gift; but extrinsic evidence is competent to control its effect.—BATA SAV. INST. v. HAWTHORN, Me., 33 Atl. Rep. 836.

106. GIFT—Savings Banks Deposit.—The important difference between a gift and a voluntary trust is that in the one case the whole title, legal as well as equitable—the thing itself, passes to the donee, while in the other the actual, beneficial, or equitable title passes to the *cestui que trust*, while the legal title is transferred to a third person, or is retained by the one creating it, to hold for the purposes of the trust. But a gift of the equitable or beneficial title must be as complete and effectual in the case of a trust as is the gift of the thing itself in a gift *inter vivos*.—NORWAY SAV. BANK v. MERRIAM, Me., 33 Atl. Rep. 840.

107. HOMESTEAD—Abandonment.—The right of minor children in a homestead left by the father, being contingent on the right of the surviving widow during her life, is lost, if she changes her domicile to another State.—CARRIGAN v. ROWELL, Tenn., 34 S. W. Rep. 4.

108. HOMESTEAD—Conveyance.—Where a widow, who had only a life estate in a homestead, conveyed the same to grantees, who agreed to extinguish sheriff's certificates issued on foreclosure sale thereof, but said grantees took an assignment of said certificates, and afterwards obtained a sheriff's deed to the premises, they cannot assert the title so acquired against the remainder-men.—MELMS v. PABST BREWING CO., Wis., 66 N. W. Rep. 244.

109. HOMESTEAD—Effect of Divorce.—Const. art. 16, § 50, exempting the "homestead of a family" from forced sale, does not, on divorce of the husband and wife, exempt the homestead, which in the decree of divorce is set apart to the wife for life, and which she continues to occupy as a home, she having no family, from forced sale under a judgment against her, recovered subsequently to the divorce.—BAHN v. STARCKE, Tex., 34 S. W. Rep. 103.

110. HOMESTEAD — Mechanic's Lien. — A contract whereby a loan company agreed to furnish all the labor and material necessary in the erection of a dwelling-house, and in consideration thereof to retain a lien on the premises for the moneys paid therefor, which was executed by weekly payments made by the loan company to the contractor for the labor and material, there being no evidence that the contract was a subterfuge to cover up a loan on the homestead, gave a lien on the premises, and did not constitute a mortgage on the homestead. — PIONEER SAVINGS & LOAN CO. v. EDWARDS, Tex., 34 S. W. Rep. 192.

111. HOMESTEAD—Rights of Wife—Law of Kansas.—One S induced his wife, who was of unsound mind, to execute a mortgage on their homestead, situated in Kansas, the mortgagee being ignorant of the wife's incapacity. Upon the institution of a suit for foreclosure, to which S, his wife, and their children were made parties, S set up such incapacity as a defense. Pending the suit, S's wife died, and the bill was dismissed as against the children, at plaintiff's request: Held, that as, under the laws of Kansas, the right of the wife in the homestead was only a right to be protected in its enjoyment during her life, the title remaining in the husband, S, could not, after his wife's death, resist the enforcement of the mortgage.—MINERS' SAV. BANK v. SANDY, U. S. C. C. (Kan.), 71 Fed. Rep. 840.

112. HUSBAND AND WIFE — Actions Between — Contracts.—A husband cannot recover for work and labor done on his wife's farm, and for taxes paid thereon, in the absence of an express contract.—STANLEY v. STANLEY, Ind., 42 N. E. Rep. 1031.

113. HUSBAND AND WIFE—Antenuptial Agreement—Deed by Husband in Fraud of Wife.—In an action by a wife to set aside a deed by the husband to land claimed by her under a prior deed given in consideration of marriage, but not recorded, where the complaint alleged the execution of such prior deed, and the evidence showed that a second deed was thereafter executed to plaintiff because of defects in the first, an amendment setting up the execution of the second deed was within Rev. St. 1889, § 2098, providing that pleadings may be amended to conform to the proof when the amendment does not substantially change the cause of action.—HARLAN v. MOORE, Mo., 34 S. W. Rep. 70.

114. HUSBAND AND WIFE—Community Personal Property.—Hill's Ann. St. § 1399, having given the husband control and management of the community personal property of the husband and wife, "with a like power of disposition as he has of his separate personal property," such property is subject to seizure on execution for his individual debts.—POWELL v. PUGH, Wash., 43 Pac. Rep. 879.

115. HUSBAND AND WIFE—Deed to Wife.—Where, in attachment against a husband, his wife claims the property by deed from her husband, declarations of the husband as to his ownership of the property made before he conveyed the land to his wife are not admissible, but such as were made afterwards, while the husband was in possession of the land are admissible.—GEORGE TAYLOR COMMISSION CO. v. BELL, Ark., 34 S. W. Rep. 80.

116. HUSBAND AND WIFE—Right of Husband's Creditors.—An insolvent debtor may, as against his creditors, employ his time in aiding his wife to carry on a business owned by her, so that the accumulation will belong to her.—SHELDEN v. SHATTUCK, Mich., 66 N. W. Rep. 220.

117. HUSBAND AND WIFE—Separate Property of Wife.—A husband, at his wife's request, bought two lots for her, and also, at her request, borrowed the money to pay for the same and build a house thereon, and gave his notes therefor, which were paid at maturity by the wife from her separate property. The husband took the title to the lots in his own name, and they were levied on by a creditor of his, but whose debt was not made on the faith of his ownership of the property, but before its purchase. Before sale under the levy, the husband conveyed the property, through a third person to his wife: Held, that the husband was a trustee of the wife, and his creditors obtained no in-

terest in the property.—CLOWSER v. NOLAND, Mo., 34 S. W. Rep. 64.

118. INJUNCTION BOND—Damages.—Where one sues to enjoin the withdrawal of water from a natural stream, claiming that he is entitled to the entire flow, and, without hearing, a *pro forma* decree is entered, on bill and answer, dismissing the bill, and continuing the temporary injunction, as modified by agreement of the parties, till final disposition of the cause, and the supreme court, on a trial on the merits, affirms the decree, attorney's fees incurred by defendant in the supreme court cannot be included in assessing damages on the bond.—BARRE WATER CO. v. CARNE, Vt., 33 Atl. Rep. 898.

119. INSOLVENCY—Validity of Preferences.—A statute which declares that all assignments in trust, made in contemplation of insolvency, with intent to prefer one or more creditors, shall inure to the benefit of all creditors equally (Rev. St. Ohio, § 6343), does not extend to the case of an insolvent debtor giving mortgages to certain creditors with intent to prefer them separately, and without creating any trust in favor of any other party, and such preferences are valid. And it is not sufficient to bring the case within the statute to aver that the creditor receiving such mortgage holds in trust for himself and for the assignor, for this is a mere averment of a legal conclusion.—ENGLAND v. RUSSELL, U. S. C. C. (Ohio), 71 Fed. Rep. 818.

120. INSURANCE—Breach of Condition—Waiver.—An insurance company which, after a loss of the property covered by its policy, with a knowledge of acts amounting to a breach of warranty by the insured, fails to declare such policy forfeited, but on the contrary continues to recognize its liability thereon by demanding repeated proofs of loss, and by insisting upon arbitration under a stipulation which applies to the measure of damages only, will be held to have waived all defenses based upon such breach of warranty and resulting forfeiture of the policy.—HOME FIRE INS. CO. v. KENNEDY, Neb., 66 N. W. Rep. 278.

121. INSURANCE — Conditions—Judgment Liens.—An insurance policy which provides that it shall be void "if there be a mortgage, bill of sale, or other lien" on the property insured without the fact being indorsed on the policy, is not invalidated by the fact that, at the time of the insurance, there were judgment liens against the property.—GEORGIA HOME INS. CO. v. SCHIELD, Miss., 19 South. Rep. 94.

122. INSURANCE — Condition in Policy — Parol Evidence.—A clause in a policy on a stock of goods, requiring the assured to keep a set of books showing the changes taking place from time to time in the stock, cannot be varied by parol evidence that before the policy was issued the company's agent told the assured that it was unnecessary to keep such books.—GERMANIA INS. CO. v. BROMWELL, Ark., 34 S. W. Rep. 83.

123. INSURANCE—Failure to Disclose Incumbrance.—The withholding of information as to an incumbrance on property in an application for insurance avoids the policy, where contrary to a condition of the contract.—LESTER v. MISSISSIPPI HOME INS. CO., Miss., 19 South. Rep. 99.

124. INSURANCE—False Statements in Application.—Where a policy provided that no statements made or given to its agents, or any other person, should affect its rights unless incorporated in the application, parol evidence of statements made to the agents of defendant is admissible to show a waiver of the breach of warranty of such statements, where it was proposed to follow it up by showing that the information given to the agents had been communicated to the company.—WARD v. METROPOLITAN LIFE INS. CO., Conn., 33 Atl. Rep. 902.

125. INSURANCE—Limitation of Suit.—Act March 4, 1891, forbidding stipulations for a period of time less than two years in which to sue, and including, in terms, "any stipulation, contract or agreement," invalidates a stipulation limiting to six months the time in which suit may be brought on a policy.—GERMAN INS. CO. v. LUCKETT, Tex., 34 S. W. Rep. 172.

126. INSURANCE—Policy.—A paper, headed "Conditions," containing a stipulation that the assured shall at all times keep his commercial books and papers in an iron safe to preserve them from fire, the paper being plainly marked as part of the policy, delivered to and accepted by the assured, will be deemed part of the policy, especially when the assured sues upon the policy with the paper attached as constituting his contract.—GOLDMAN v. NORTH BRITISH MERCANTILE INS. CO., La., 19 South. Rep. 132.

127. INTEREST—Usury.—Interest reserved on coupon interest notes after their maturity, which were given at the inception of the principal debt to secure the annual interest accruing thereon, is not usurious.—STICKNEY v. MOORE, Ala., 19 South. Rep. 76.

128. INTOXICATING LIQUOR — Petition for Liquor License.—A petition filed in an application for license to sell intoxicating liquors should contain such a description of the premises where it is proposed to conduct the business as indicates the exact location; and if it does this it is sufficient.—WAUGH v. GRAHAM, Neb., 66 N. W. Rep. 301.

129. INTOXICATING LIQUORS — Sales by Druggist.—The imposition of a $50 license fee on druggists for right to sell liquor is not unconstitutional, as an abuse of the police power, though in a certain locality its effect is to preclude druggists selling the same.—COMMONWEALTH v. FOWLER, Ky., 34 S. W. Rep. 21.

130. JUDGMENT—Collateral Attack.—Erroneous action of the circuit court in an attachment suit in allowing cost to the plaintiff, the amount recovered being less than $100, cannot be collaterally attacked in an action on the bond of an intervener, conditioned on the payment of the judgment recovered, which should be adjudged a lien on the property.—GILL v. BACKUS, Mich., 66 N. W. Rep. 347.

131. JUDGMENT—Equitable Relief.—A court of equity will not enjoin a judgment at law, upon the ground of fraud, where it does not appear that such judgment is inequitable, or where it is disclosed that plaintiff has not exercised due diligence in the assertion of his rights.—NORWEGIAN PLOW CO. v. BOLLMAN, Neb., 66 N. W. Rep. 292.

132. JUDGMENT—Insane Surety.—A judgment rendered against an insane surety on an attachment bond, who was sane at the time the bond was executed, is valid.—POLLOCK v. HORN, Wash., 43 Pac. Rep. 885.

133. JUDICIAL SALE—Validity.—Where interested parties attack the title of property offered at a judicial sale, in such a way as to deter bidders and depress values, and where the price paid for the property is greatly inadequate, the sale should be set aside.—WOOD v. DRURY, Kan., 43 Pac. Rep. 763.

134. JURY — Peremptory Challenge.—In a criminal trial, after the first witness had commenced to testify, a juror told the court that he might have talked about the case, though on his examination he had stated the contrary, and the court granted defendant's motion for his examination over objection. The witness proving competent, defendant, who had not exhausted all his peremptory challenges, without the interposition of any further motion, challenged the juror peremptorily: Held, that the challenge was properly denied; Rev. St. 1894, § 1863 (Rev. St. 1881, § 1794), providing that peremptory challenges shall be made before the jury is sworn, and the proper course being to move to set aside the submission.—KURTZ v. STATE, Ind., 42 N. E. Rep. 1102.

135. LANDLORD AND TENANT — Lease—Damages.—A tenant, evicted when his crops were growing, may not recover of the landlord, as damages, the value of the matured and gathered crops, without an allowance for rent.—JEFCOAT v. GUNTER, Miss., 19 South. Rep. 94.

136. LANDLORD AND TENANT—Lien.—Under Code, § 3069, providing that the landlord shall have a lien on the furniture of his tenant, which shall be superior to

all other liens except those for taxes, the lien of a vendor on furniture sold a tenant, which was on the premises at the time of the sale, and on which a mortgage was taken to secure the purchase price, is superior to that of the landlord afterwards accruing.—GLASS v. TISDALE, Ala., 19 South. Rep. 70.

137. LANDLORD AND TENANT—Tenant from Year to Year—Right to Crops.—Where a tenant occupies a farm under a written lease for two years, and after the termination of the time specified in the written lease, remains in the actual occupancy of the farm with the assent of the owner, cultivating the same, and paying the same rent that he did under the written lease, he becomes a tenant from year to year, and it requires a notice in writing for three months prior to the end of the year to terminate such lease.—WHEAT v. BROWN, Kan., 43 Pac. Rep. 807.

138. LIBEL—Privileged Communications.—To prefer written charges against a policeman before the board of police commissioners, to the effect that he had committed perjury, falsely and with the deliberate purpose of injuring said policeman and causing his dismissal from the police department, is actionable.—DENNEHY v. O'CONNELL, Conn., 33 Atl. Rep. 920.

139. LIFE INSURANCE—Mutual Benefit Society—Change of Certificate.—A mutual benefit society which issues to a member a certificate of insurance, conditioned, among other things, on "paralysis so extensive as to produce absolute disability," cannot modify the certificate, by excluding this cause of disability, without the express consent of the member.—STARLING v. SUPREME COUNCIL ROYAL TEMPLARS OF TEMPERANCE, Mich., 66 N. W. Rep. 340.

140. LIFE INSURANCE—Suicide—Insanity.—Suicide of the insured is not a breach of a warranty in his application that he will not "die by his own hand," if, at the time of taking his life, his reasoning faculties are so far impaired that he is not able to understand the moral character, general nature, consequences and effect of his act, or when he is impelled thereto by an insane impulse which he has not the power to resist.—MUTUAL LIFE INS. CO. OF NEW YORK v. LEUBRIE, U. S. C. C. of App., 71 Fed. Rep. 843.

141. LIFE INSURANCE—Surrender—Consent of Beneficiaries.—Under a life policy payable to insured in twenty years, if he was then alive; but in case of his death before that time payable to his mother, if living; if not, to his brothers and sisters; and providing that, on surrender thereof at the end of three years, "receipted by the insured and beneficiaries," the cash value specified therein would be paid, it is necessary, on making such surrender, that the receipt be signed, not only by insured and his mother, but by the other beneficiaries.—LOCKWOOD v. MICHIGAN MUT. LIFE INS. CO., Mich., 66 N. W. Rep. 230.

142. LIMITATION OF ACTION—County Warrants.—The provisions of Rev. St. 1889, § 8195, that a county warrant, having been delivered, that shall not be presented for payment within five years from its date, or having been presented and not paid for want of funds, shall not be again presented within five years after the funds shall have been set apart for its payment, "shall be barred and shall not be paid, nor shall it be received in payment of any taxes or other dues," is a limitation of actions on warrants, as well as a direction to the county officers, and governs such actions, to the exclusion of the general statute of limitations, under the provisions of the latter (§ 6791) that it shall not extend to any action otherwise limited by any statute.—WILSON v. KNOX COUNTY, Mo., 34 S. W. Rep. 45.

143. LIMITATION OF ACTIONS—Personal Privilege.—Where the statute of limitations is pleaded as a defense, but the defendant, when testifying, states explicitly that he does not plead the statute, the plea, which is a personal privilege, must be regarded as withdrawn, and the issue should not be further considered.—LEWIS v. BUCKLEY, Miss., 19 South. Rep. 197.

144. MANDAMUS—Validity—Collateral Attack.—A writ of *mandamus* to compel county officers to pay judgments against the county is not void because the judgments were void.—BOASEN v. STATE, Neb., 66 N. W. Rep. 303.

145. MARRIED WOMAN—Damages.—In an action by a wife for personal injuries, she may recover damages for any impairment of her capacity to earn money.—HAMILTON v. GREAT FALLS ST. RY. CO., Mont., 43 Pac. Rep. 713.

146. MASTER AND SERVANT—Action for Injuries.—A railroad company is not an insurer of the safety of its employees, but is liable for injuries resulting to an employee from its failure to exercise reasonable and ordinary care toward him, unless he has been guilty of contributory negligence upon his part.—ATCHISON, T. & S. F. R. CO. v. WINSTON, Kan., 43 Pac. Rep. 777.

147. MASTER AND SERVANT—Assumption of Risks.—Laws 1890, ch. 398, § 12, imposing a penalty on the owner of factories in which women are employed for failure to cover cogwheels, does not prevent a woman from assuming the obvious risks from uncovered cogwheels.—KNISLEY v. PRATT, N. Y., 42 N. E. Rep. 986.

148. MASTER AND SERVANT—Contributory Negligence—A boy of 14 years, being employed in a tinware factory to operate a small foot machine used for the purpose of punching eyes in small tin cans that were being manufactured by machinery, who voluntarily leaves his place of business and goes away to another part of the establishment for the purpose of adjusting a belt connecting one of the machines of the factory with the line of the main shaft, and while thus employed receives serious and fatal injuries, of which he dies, his parents cannot recover damages of the corporation.—DALY v. H. HALLER MFG. CO., La., 19 South. Rep. 116.

149. MASTER AND SERVANT—Injuries to Employee.—A complaint alleging that deceased, while employed in the yard of defendant stone company, was crushed by a large stone, which fell on him; that defendant had negligently placed and for three months allowed said stone to remain with its edge resting upon two small stones, laid on loose earth, which was liable to press down on one side, and allow the stone to fall over; and that deceased was ignorant of the dangerous condition of said stone, and was unable to see the earth under said stone, does not show that the said loose earth was the cause of said stone's falling over, but shows that the danger complained of was incident to the service, failure to negative the assumption of which renders the complaint bad.—SALEM BEDFORD STONE CO. v. HOBBS, Ind., 42 N. E. Rep. 1022.

150. MASTER AND SERVANT—Negligence—Machinery.—In an action to recover for injuries received by plaintiff while employed as engineer in defendant's mill, and in working with a certain machine, the question whether or not such machine was being used "in the manner contemplated by its manufacturer" is immaterial, and an instruction that makes the liability of defendants, or the risk assumed by plaintiff in his employment, dependent on whether the machine was so used, is misleading and erroneous.—GLOVER v. MEINRATH, Mo., 34 S. W. Rep. 72.

151. MASTER AND SERVANT—Railroad Companies—Negligence.—That a station agent, whose duty it is to signal trains from the depot platform, goes upon the track to follow and stop a train, the engineer of which failed to show that he had seen the signal to stop, and thereby prevent a collision, does not render him a trespasser, so as to relieve the company of liability for injuries to him, unless the employees upon the train actually knew of his presence in time to avoid injury to him.—ILLINOIS CENT. R. CO. v. MAHAN, Ky., 34 S. W. Rep. 16.

152. MASTER AND SERVANT—Railroads—Injuries to Employee—Negligence.—In an action for the death of a brakeman, where there is evidence that he was killed by a steel rail falling from the flat car on which it was loaded, and being thrown against him by the motion of the train while he was sitting on a rear car, it is

error to direct a verdict for defendant.—McCRAY v. GALVESTON, H. & S. A. RY. CO., Tex., 34 S. W. Rep. 95.

153. MASTER AND SERVANT—Rule of Safe Place.—Libelant, the mate of a vessel, was engaged in the between decks, with a gang of men, in loading lumber. A chute led from the wharf to a port in the vessel's side, below the level of the wharf, and the pieces of lumber were placed in the chute by another set of men, under the charge of a foreman, on the wharf, and were allowed to slide down into the between decks. It was the duty of one of the men on the wharf to give a warning cry when a piece of lumber was placed in the chute, in order to enable those below to get out of the way. If this warning cry was given, there was no danger to the men below, and the place in which they were working was in itself proper and safe, and the man to whom the duty of giving warning was intrusted was a competent and proper person. He omitted to give the warning at the time of sending a large piece of lumber down the chute, and libelant was struck by it and injured: Held, that the master's duty to furnish a safe place for his employees to work did not extend beyond employing a competent and proper person to give the necessary warning, nor include the actual giving of such warning in each particular case.—HERMANN v. PORT BLAKELY MILL CO., U. S. D. C. (Cal.), 71 Fed. Rep. 853.

154. MECHANICS' LIENS — Enforcement—Sureties.—A surety on a contractor's bond cannot be held liable thereon when the failure of performance of the contract is caused by the default of the obligee.—MAIN STREET HOTEL CO. OF HORTON v. HORTON HARDWARE CO., Kan., 43 Pac. Rep. 769.

155. MECHANICS' LIENS — Liability of Owner.—The contractors having failed to complete certain buildings, the owners thereof are not liable to a subcontractor for the amounts paid by them to others in order to protect and complete the buildings, though they had notice of said subcontractor's claim.—BRENEMAN v. BEAUMONT LUMBER CO., Tex., 34 S. W. Rep. 198.

156. MECHANICS' LIENS — Notice — Waiver.—The requirements of Pub. Acts 1891, No. 179, § 4, providing that a contractor shall furnish the owner a statement of laborers and material-men under his contract, with the amounts due each, before he shall have a right of action to enforce a mechanic's lien therefor, cannot be considered waived in favor of a contractor unless under circumstances amounting to an estoppel.—STERNER v. HAAS, Mich., 66 N. W. Rep. 348.

157. MECHANIC'S LIEN—Service of Summons.—In an action to enforce a mechanic's lien, service of summons upon the owner within the period of limitation prescribed by statute for the commencement of such an action does not preserve the lien as against other incumbrancers who are not made parties to such an action within the period of limitation.—WOOD v. DILL, Kan., 43 Pac. Rep. 822.

158. MINES AND MINING—Right to Follow Dip.—When the outcrop of a vein passes through one end line and one side line of a location, the locator may draw in the other end line to the point of intersection of the vein with the side line, and abandon what lies beyond; and he will then have the same extralateral rights as if the claim had been so located in the first instance.—TYLER MIN. CO. v. LAST CHANCE MIN. CO., U. S. C. C. (Idaho), 71 Fed. Rep. 848.

159. MORTGAGES—Foreclosure—Parties.—Under Code Proc. § 143, providing that all persons interested in the cause of action must be made parties, an assignor, in an action to foreclose a mortgage as to interest coupons which he has taken up as guarantor, must make the holder of the principal bond a party.—BACON v. O'KEEFE, Wash., 43 Pac. Rep. 886.

160. MORTGAGES — Subrogation. — That borrowed money was used in paying a debt secured by lien on the debtor's property does not entitle the lender, who was under no obligation to pay the debt in the absence of an agreement, to be subrogated to the rights of the lienor.—GOOD v. GOLDEN, Miss., 19 South. Rep. 100.

161. MORTGAGE FORECLOSURE—Waiver of Irregularities.—Where a mortgagor is in position to waive an irregularity in foreclosure proceedings under a power of sale, and to confirm and validate a sale of the mortgaged premises to the mortgagee for the full amount of the debt, with interest and all costs—there being no other person except the mortgagor who could at any time question the regularity of the sale—and the mortgagor has, within a reasonable time, caused a deed to be tendered conveying perfect title to the mortgagee, the latter cannot insist upon the invalidity in the foreclosure proceedings, repudiate the sale and maintain an action to recover upon the mortgage note.—SAXE v. RICE, Minn., 66 N. W. Rep. 268.

162. MUNICIPAL CORPORATIONS—Change of Grade of Streets—Damages.—Under the constitution of this State, providing that private property shall not be taken or damaged for public use without compensation, a city is liable for damage resulting from a material change of the grade of its streets from the natural surface.—CITY OF HARVARD v. CROUCH, Neb., 66 N. W. Rep. 276.

163. MUNICIPAL CORPORATIONS — Construction of Walks—Injuries.—A municipality is not responsible for personal injuries resulting solely from a property holder's failure to construct a walk in front of his premises as ordered.—SHIETART v. CITY OF DETROIT, Mich., 66 N. W. Rep. 221.

164. MUNICIPAL CORPORATIONS—Contractor's Bond—Release of Sureties.—Sureties on the bond of a contractor for a public improvement requiring payment for all labor and material furnished for the work are not released, by payment of an antecedent debt by the contractor to a material-man from the contract price, to the extent of such payment, from liability to such material-man for materials furnished.—HIRTH v. POWERS, Mich., 66 N. W. Rep. 215.

165. MUNICIPAL CORPORATIONS—Grant of Street Franchise.—The city of St. Louis has no power to grant the privilege of constructing electrical subways under the surface of its streets for the private gain of the grantee, though intended to be leased to others for public uses, as it would be, in effect, to delegate its powers over the public streets to others, to be exercised for their own profit; nor has it the right to permit such constructions without reserving the power of control over their construction, maintenance, and use.—STATE v. MURPHY, Mo., 34 S. W. Rep. 51.

166. MUNICIPAL CORPORATIONS—Power to Take by Devise.—At common law, municipal corporations authorized to hold land in *mortmain* had power to take by devise.—MCINTOSH v. CITY OF CHARLESTON, S. Car., 23 S. E. Rep. 943.

167. MUNICIPAL CORPORATIONS—Special Assessments.—Though a city fails to obtain jurisdiction to make a special assessment for a street improvement, because of a defective notice, yet, if a property owner signs the petition for such improvement, and, at the time it is being made, personally inspects the work, and makes no objections thereto, or to the levying, of the assessment, he and his successors in interest will be estopped from questioning the validity of the proceedings.—WINGATE v. CITY OF TACOMA, Wash., 43 Pac. Rep. 874.

168. MUNICIPAL CORPORATIONS — Street Improvements.—Under Rev. St. 1894, § 4292, providing that the common council of a city or town, "with the concurrence of two-thirds of the members thereof," may order street improvements made, an allegation in a complaint that such improvement was ordered by a city, "by a two-thirds vote of her common council," is sufficient.—CITY OF CONNERSVILLE v. MERRILL, Ind., 42 N. E. Rep. 1112.

169. NATIONAL BANK—Action for Money Loaned.—A national bank, having joined with other persons in a partnership to operate a mill, cannot be prevented from recovering moneys loaned to the firm, on the ground that it had no power to become a partner in a mill.—CAMERON v. FIRST NAT. BANK OF DECATUR, Tex., 34 S. W. Rep. 178.

170. NEGLIGENCE — Dangerous Premises — Falling Building.—Every one is bound to keep his buildings in repair, so that neither their fall, nor that of any part of the materials composing them, may injure the neighbors or passengers, under penalty of all losses and damages which may result from the neglect of the owner in that respect. The owner of the building cannot free himself from this primary obligation by leaving to an insurance company, which, carrying a policy on the building, had elected, after a fire, to make repairs upon it, to determine the necessity of and the extent of repairs. He cannot, as between himself and the public, shift responsibility from himself to the insurance company. The insurance contract may fix and determine the rights and obligations of the parties thereto, but it is not a measure for the rights of the public, nor a criterion by which to test the liability of the owner to it.—STEPPE V. ALTER, La., 19 South. Rep. 147.

171. NEGLIGENCE—Pleading.—In an action by a servant of the lessee against the lessor for personal injuries caused by the defective condition of the elevator in the building of the lessor, which the lessee had the privilege of using, and received while the servant was using the elevator, by reason of its falling, the complaint need not set out in what way the elevator was defective.—ELLIS V. WALDRON, R. I., 33 Atl. Rep. 869.

172. NEGOTIABLE INSTRUMENT — Extension of Note.—The fact that, at the maturity of a note, and at the end of each year for two years thereafter, the principal maker paid to the holder interest for the year past, either at a legal or usurious rate, will not operate as a novation, and release sureties from liability thereon, without satisfactory proof of an agreement for a definite extension in consideration of such payments.—ALLEY V. HOPKINS, Ky., 34 S. W. Rep. 13.

173. NEGOTIABLE INSTRUMENT—Indorsement.—Where there is no evidence as to the date of an indorsement of negotiable paper the presumption of law is that it was made before maturity, and that the holder is a *bona fide* holder for value; and the party who denies this must prove it, and without such proof he cannot avail himself of the equities of defenses.—CHALLIS V. WOODBURN, Kan., 43 Pac. Rep. 792.

174. NEGOTIABLE INSTRUMENT — Note — Limitation.—When a party has pleaded the statute of limitations as a defense to a promissory note, and such note is introduced in evidence by the opposing party, and it appears upon its face to be barred by the statute,—the court taking judicial notice of when the action was commenced,—the burden of proving such facts as will show the note is not in fact barred devolves upon the party claiming under the note.—DIELMANN V. CITIZENS' NAT. BANK OF MADISON, S. Dak., 66 N. W. Rep. 311.

175. NEGOTIABLE INSTRUMENT — Place, Manner, and Time of Payment.—A note does not lose negotiability, as allowing payment by another note instead of money, by a provision that, if desired, the indebtedness could be extended by the makers and indorsers giving a new note.—ANNISTON LOAN & TRUST CO. V. STICKNEY, Ala., 19 South. Rep. 63.

176. NUISANCE — Obstruction of Navigable Stream.—The fact that an obstruction in a navigable stream is a matter of public concern does not prevent the maintenance of an action by a person whose private interests are affected thereby, to protect such interests.—GARL V. WEST ABERDEEN LAND & IMPROVEMENT CO., Wash., 43 Pac. Rep. 890.

177. OFFICE AND OFFICERS — Appointment and Removal.—The grant of power to appoint to public office, where no term of office is fixed by law, carries with it as an incident the absolute power of removal at any time, without notice or charges or a hearing, and without the cause for removal being inquired into by any court. Such power vested in a board cannot be limited by any action taken by such board, whether by appointing the officer for a fixed term, or by by-laws restricting the power of removal to cases where cause for removal exists.—STATE V. ARCHIBALD, N. Dak., 66 N. W. Rep. 235.

178. OFFICE AND OFFICER—Vacancies—Appointments.—The general rule is that a prospective appointment to fill a vacancy sure to occur in a public office, made by an officer who, or by a body which, as then constituted, is empowered to fill the vacancy when it arises, is, in the absence of a law forbidding it, a valid appointment, and vests title to the office in the appointee.—STATE V. CHILDS, Minn., 66 N. W. Rep. 264.

179. PARTNERSHIP—Accounting — Appeal.—A decree in a partnership accounting will not be disturbed on appeal where it appears that the settlement was just, and was made on a consideration of all the partnership affairs.—EAMES V. MILLER, Mich., 66 N. W. Rep. 338.

180. PAYMENT — Lien on Machinery.—Where purchaser of goods give an acceptance for the price, and neither party regards it other than evidence of the amount to be paid, it will not be considered as payment.—MARINETTE IRON WORKS CO. V. CODY, Mich., 66 N. W. Rep. 534.

181. PAYMENT—Presumption—Lapse of Time.—Where, 27 years after the maturity of a series of promissory notes and the last indorsement of interest paid thereon, an action was brought upon the notes, and to foreclose a mortgage given to secure them, held that, although the statute of limitations was not a bar, because of the non-residence and absence of the defendants, yet the lapse of time raised a presumption of payment, which was not overcome by the facts found and the evidence received or offered.—COURTNEY V. STAUDENMAYER, Kan., 43 Pac. Rep. 758.

182. PLEADING—Action on Note.—Want of consideration in an action on a promissory note is new matter, which must be specially pleaded, and is not available as a defense under a general denial.—SHARPLESS V. GIFFEN, Neb., 66 N. W. Rep. 285.

183. PLEADING—Aider by Verdict.—A complaint for goods sold, failing to allege the date of such sale, or the reasonable value or agreed price of such goods, or the terms of payment, is cured by verdict, where an itemized statement was furnished to defendant, and defendant admitted the delivery of the goods.—NICOLAI BRO. CO. V. KRIMBLE, Oreg., 43 Pac. Rep. 865.

184. PLEDGE — Collateral Security—Express Agreement as to Sale.—In the absence of express agreement authorizing it, a pledgee cannot become the purchaser of the pledged property at his own sale; and if the property be bid off by him, the contract of pledge is not thereby terminated, nor the relations of the parties changed, unless the pledgor elects to treat the transaction as a valid sale, in which event the pledgee will be accountable for the net proceeds of the sale.—GLIDDEN V. MECHANIC'S NAT. BANK, Ohio, 42 N. E. Rep. 995.

185. PRINCIPAL AND AGENT.—Where one intrusted with the sale of real estate purchases it himself through other parties, the vendor may rescind the sale, though the price paid is all that was demanded by her.—RICH V. BLACK, Penn., 33 Atl. Rep. 881.

186. PRINCIPAL AND AGENT.—Where one conducting business for another, under an agreement to be responsible for all goods sold by him, takes a note for goods sold, which is, after the close of the business, renewed by the principal, such renewal does not release the agent from liability for the goods.—BUELTERMAN V. MEYER, Mo., 34 S. W. Rep. 67.

187. PRINCIPAL AND AGENT — Agency to Sell Land—Revocation.—The interest of a real estate broker in commissions to be earned will not prevent a revocation of his agency at any time prior to a sale.—NEAL V. LEHMAN, Tex., 34 S. W. Rep. 153.

188. PRINCIPAL AND AGENT—Broker—Action for Commission.—Where a contract for procuring a sale specifies a fixed price, and in an action on the contract for commissions there is evidence that plaintiff procured a purchaser with whom defendant personally negotiated a sale for a less sum, but none to show that the purchaser was willing to pay the specified price, or

why he did not pay it, a nonsuit should be directed.—CHILDS v. PTOMEY, Mont., 43 Pac. Rep. 715.

189. PRINCIPAL AND AGENT—Contracts.—A contract, to be obligatory upon a principal, when made by an agent, must be made in the name of the principal. If the agent contract in his own name, the contract is the contract of the attorney and not of the principal.—COCKERHAM v. PEROT, La., 19 South. Rep. 122.

190. PRINCIPAL AND AGENT—Ratification of Agent's Acts.—One, who with knowledge of the facts, received the proceeds of lumber cut by plaintiff under an unauthorized contract made by his agent with plaintiff, ratified the contract.—SMITH v. BARNARD N. Y., 42 N. E. Rep. 1054.

191. PRINCIPAL AND SURETY—Indemnity.—A share of certain money distributed by order of court was allotted to a married woman, and paid to her attorney. Before paying it over to his client, he exacted from her a bond of indemnity to hold him harmless if he was compelled to refund it, which was given and signed by her husband as surety. The order of distribution was afterwards set aside, and the attorney assigned the bond to the person by the final order entitled to the money: Held, that there having been no recovery against the attorney, and there being no liability for the money on his part, the assignee could not recover on the bond.—WARRUM v. DERRY, Ind., 42 N. E. Rep. 1123.

192. PRINCIPAL AND SURETY—Indemnity—Employee's Fidelity Bond —A surety on a fidelity bond, indemnifying a corporation against loss of money intrusted to its treasurer, through the "embezzlement or larceny" thereof by him, is not liable for money intrusted to him, and for which he failed to account, on which, while in his hands, the corporation charged him interest.—MILWAUKEE THEATER CO. v. FIDELITY & CASUALTY CO., Wis., 66 N. W. Rep. 360.

193. PRINCIPAL AND SURETY — Partnership.—Parties who signed the bond of one of the members of a copartnership, conditioned for the due and faithful performance of his duties in and concerning the business in which the firm engaged, held not released from their obligation thus assumed by an increase in the amount of the capital invested in the business.—MCAULEY v. COOLEY, Neb., 66 N. W. Rep. 304.

194. PRINCIPAL AND SURETY—Release of Surety.—The cancellation of the principal debtor's deed of trust on his own property releases the surety from liability on a deed of trust on her property given as additional security.—CHISM v. THOMPSON, Miss., 19 South. Rep. 210.

195. PROCESS — Summons—Publication.—Code Civ. Proc. 1887, § 73, provides that in certain cases, when an affidavit setting up any such case is filed with the clerk, and stating that a cause of action exists against defendant, and that he is a necessary or proper party to the action, the clerk shall cause the service of summons by publication: Held, that the affidavit is sufficient if it sets forth, substantially in the language of the statute, enough of the ultimate facts recited in the statute as reasons for the publication of the summons.—ERVIN v. MILNE, Mont., 43 Pac. Rep. 706.

196. PROHIBITION—When Granted.—Where an inferior court acts within the bounds of its jurisdiction, and there are no marked defects or irregularities in its proceedings, the supreme court, under its supervisory jurisdiction, will not annul the judgment rendered in the case, though it may be contrary to the law and the evidence.—STATE v. KING, La., 19 South. Rep. 142.

197. PROHIBITION—When Lies.—Prohibition against proceedings in a lower court will not lie, unless it is affirmatively shown that the supreme court has jurisdiction, and that the lower court is acting or threatening to act without authority.—CLIFFORD v. PARKER, Wash., 41 Pac. Rep. 717.

198. RAILROAD COMPANIES — Condemnation Proceedings.—The measure of damages to land by the location of a railroad through it, aside from the value of the land appropriated for the right of way, is the depreciation in the market value of the land by reason of such location of the road; and, as tending to show such depreciation, all the inconveniences directly caused by the road may be taken into consideration.—OMAHA, H. & G. RY. CO. v. DONEY, Kan., 43 Pac. Rep. 831.

199. RAILROAD COMPANY—Elevated Railroad—Injunction.—The operation of an elevated railway in front of plaintiff's premises will not be restrained, on the ground of interference with his easements of light, air, and access, where it was shown that the use of the street by such railway was authorized by law, that the value of the property had been greatly enhanced by its construction and maintenance, and no actual damage was shown.—O'REILLY v. NEW YORK EL. R. CO., N. Y., 42 N. E. Rep. 1063.

200. RAILROAD COMPANIES—Municipal Corporations —Power to Close Street.—A city council has no power to close the intersection of streets to the public, and give a railroad company exclusive use thereof, in the absence of any general law or provision in the city charter giving it such power.—SAN ANTONIO & A. P. RY. CO. v. BERGSLAND, Tex., 34 S. W. Rep. 154.

201. RAILROAD COMPANIES—Negligence.—One who is about to cross the track, and would under ordinary circumstances have ample time to do so, but is arrested in crossing by an alarm and commotion in a city street which is crowded with people, and is run down by a train coming around a curve, is not chargeable with contributory negligence.—ALABAMA & V. RY. CO. v. LOWE, Miss., 19 South. Rep. 96.

202. RAILROAD COMPANIES—Negligence—Trespassers.—The evidence showed that deceased, a trespasser on defendant's track was first observed by the engineer when 400 feet away, though he might have been seen for one-eighth of a mile, the track being unobstructed for that distance; that, on seeing him, the engineer gave a sharp warning whistle, which could be heard for several miles there being scarcely any breeze stirring, and no noise except that made by the train and the bell, which was kept continually ringing; that deceased must have walked at least 15 feet after the signal was given; and that the train could not have been stopped in less than 600 feet: Held, that defendant was not negligent.—SINCLAIR v. CHICAGO, B. & K. C. RY. CO., Mo., 34 S. W. Rep. 76.

203. RAILROAD COMPANIES—Presumptions of Negligence on the part of the operatives of a railroad train cannot be presumed from the mere fact that a personal injury was caused by such train to one to whom the railroad company owed no contract duty.—ATCHISON, T. & S. F. R. CO. v. MCFARLAND, Kan., 43 Pac. Rep. 788.

204. RAILROAD COMPANY—Separate Coach Act—Damages.—A railroad company is not liable to a private person, for failing to furnish him "a coach equal, in all points of comfort and convenience to the one provided for white passengers on the same train," as required by the separate coach act, in the absence of evidence that plaintiff was damaged thereby.—NORWOOD v. GALVESTON, H. & S. A. RY. CO., Tex., 34 S. W. Rep. 180.

205. RAILROAD COMPANIES — Speed of Train—Negligence.—When the ordinances of a city through which a railroad runs prohibit the running of trains at a greater speed than six miles an hour within the city limits, the running of a train at greater speed than that allowable is negligence *per se*, but it is not such negligence as authorizes the recovery of damages for an injury inflicted by such train, unless it appears from the evidence that such unlawful speed was the proximate cause of the injury.—CHICAGO, R. I. & P. RY. CO. v. KENNEDY, Kan., 43 Pac. Rep. 802.

206. RAILROAD COMPANIES — Use of Track as Footway.—No duty rests upon a railway company in favor of the public who uses its track as a footway to keep its switches blocked in its private switchyards, to lessen the chances of injury to pedestrians.—INTERNATIONAL & G. N. RY. CO. v. LEE, Tex., 34 S. W. Rep. 160.

207. RAILROADS — Construction — Surface Water.—When the contour of land is such that a railroad embankment must dam the natural outlet of the surface water from farm lands, and a short trestle, no higher or costlier than the embankment, would obviate the difficulty, the company building such embankment with knowledge of the circumstances is liable for injury caused by the surface water to farm lands.—CANTON, A. & N. R. CO. v. PAINE, Miss., 19 South. Rep. 199.

208. RAILROADS—Contributory Negligence.—A child 13 years old is guilty of contributory negligence in attempting to pass, at a railroad crossing, between two sections of a long freight train eight feet apart, where, when she arrived at the crossing, the two sections were at a standstill, but, before she started to pass between them, the engine section had commenced to close up.—WALLACE v. NEW YORK, & H. R. CO., Mass., 41 N. E. Rep. 1125.

209. RELEASE—Ratification.—Where plaintiff, within twelve hours after an injury, while still under the influence of opiates, and without any person present to protect his rights, was induced by the railroad company liable for the injury to release his claim for a small cash payment, it is proper to instruct that the release was not binding, unless plaintiff, subsequently, when competent to act, with full knowledge of the facts and his rights under them, and of his right to disaffirm, ratified the same.—ALABAMA & V. RY. CO. v. JONES, Miss., 19 South. Rep. 105.

210. REMOVAL OF CAUSES—Federal Question.—*Mandamus* proceedings to compel a railroad engaged in interstate commerce to run its trains to a certain station in obedience to a State statute involve a federal question, since a judgment therein may impose a burden on interstate commerce.—PEOPLE v. ROCK ISLAND & P. RY. CO., U. S. C. C. (Ill.), 71 Fed. Rep. 753.

211. REPLEVIN—Pleading and Proof.—A plaintiff in replevin may, under a petition alleging general ownership and right of possession in himself and a wrongful detention by defendant, prove fraud inducing a previous sale by plaintiff to defendant, and a rescission because thereof. It is not necessary to specially plead the fraud.—PHENIX IRON WORKS CO. v. MCEVONY, Neb., 66 N. W. Rep. 290.

212. SALE—Construction of Warranty.—A warranty given by the Sultan Cart Company reads as follows: "We warrant all of our work to be of good material, and made in workmanlike manner. In case breakage shall occur within one year, by reason of defective material, we will replace all broken parts free of charge, but the agent must be cautious and use his judgment in the matter. We will not make good any breakage, only such that is defective:" Held, that this warranty should be construed as a warranty of each cart, and every part thereof, as to workmanship and material, for the period of one year, with the privilege of having any defective part or cart replaced free of cost during said period.—WATSON v. BECKETT, Kan., 43 Pac. Rep. 787.

213. SALE.—Rescission for Fraud of Buyer.—Proof of false statements knowingly made by the purchaser of goods, whereby he is shown to be possessed of a large amount of property over and above his liabilities, is admissible under an allegation that, being insolvent, he knowingly concealed his insolvency from the vendor.—FIRST NAT. BANK v. MCKINNEY, Neb., 66 N. W. Rep. 280.

214. SALE—Warranty—Breach.—The vendor, at a public auction sale of a number of horses, publicly stated "that all horses which would then and there be offered for sale had been driven single," and that all horses which were not safe to drive single would be specified when sold: Held, that where horses were afterwards sold without any statement as to whether they were safe to drive single, there was a warranty that they were safe.—INGRAHAM v. UNION R. CO., R. I., 33 Atl. Rep. 875.

215. SLANDER—Evidence—Malice.—In an action for slander the jury may consider the wealth and standing of defendant, to determine the influence of his statements.—BOTSFORD v. CHASE, Mich., 66 N. W. Rep. 325.

216. SPECIFIC PERFORMANCE.—Where the vendor, in a contract for the sale of land, fails to make the payments required by his contract, and takes no steps to enforce it after notice from the vendor that he had forfeited it, and permits a subsequent grantee to take possession of the land and make valuable improvements thereon, specific performance will not be enforced at the instance of the vendee.—CATHRO v. GRAY, Mich., 66 N. W. Rep. 346.

217. SUNDAY—Negotiable Note—Delivery.—The fact that a note was handed to plaintiff in satisfaction of a guaranty on Sunday, it not appearing that the contract was made on Sunday, would not invalidate the delivery.—STEERE v. TREBILCOCK, Mich., 66 N. W. Rep. 342.

218. SUNDAY TRAVEL—Injury to Passenger.—Gen. St. § 1569, providing that every person who shall do any secular business, or engage in any sport or recreation on Sunday, shall be fined, when construed with Pub. Acts 1882, p. 12, and Pub. Acts 1883, p. 258, repealing the sections of former statutes prohibiting travel and the letting of vehicles for hire on Sunday, does not prohibit riding for pleasure, on a street car on Sunday, so as to exempt the carrier from liability for injury to the passenger.—HORTON v. NORWALK TRAMWAY CO., Conn., 33 Atl. Rep. 914.

219. TAXATION — Special Assessments — Sprinkling Streets.—Sprinkling the streets of a city is not an improvement of the abutting property of such a character as to justify the imposition upon such abutting property of a special assessment for the expense thereof, and an act authorizing the imposition of assessments for such purpose is in violation of fundamental law, and not within the taxing power.—NEW YORK LIFE INS. CO. v. PRIEST, U. S. C. C. (Mo.), 71 Fed. Rep. 815.

220. TENANTS IN COMMON—Lease by One.—A lease by one tenant in common of the right to take oysters without the consent of his cotenant does not give the lessee an exclusive right as against subsequent lessees of the cotenant; and it is immaterial that the first lessee expended money in making the bed productive.—MOTT v. UNDERWOOD, N. Y., 42 N. E. Rep. 1048.

221. TENDER—Running of Interest.—Where money is borrowed from a bank for the purpose of making a tender, and, on its refusal, is again returned to the bank, this is insufficent to stop the running of interest. To have that effect, the money must be kept continually ready, so that no profit is made upon it.—MIDDLE STATES LOAN, BLDG. & CONST. CO. OF HAGERSTOWN v. HAGERSTOWN MATTRESS & UPHOLSTERY CO. OF WASHINGTON COUNTY, Md., 33 Atl. Rep. 886.

222. TRADE-MARKS — Descriptive Words.—Where the words "Fire-Proof Oil" are used to designate a peculiar brand of illuminating oil, and are thus used in a label, in connection with the name of the manufacturer and its place of business, the words are used in the sense of affirming a high degree of purity which renders the oil non-explosive from fire contact, and, being thus descriptive, cannot be appropriated to an exclusive use.—SCOTT v. STANDARD OIL CO., Ala., 19 South. Rep. 71.

223. TRESPASS—Equity.—To a bill filed by the owners in fee of land, alleging that the defendants, with design to defraud and injure complainants, had entered upon the land under color of a void tax deed, and had committed irreparable injury, by digging and taking from the soil phosphate of great value and quantity, the exact value of which could not be ascertained without an accounting, and praying for an injunction and account of the phosphate dug, a plea was interposed, alleging, simply, that defendants were not committing the trespass and injury alleged at the time the bill was filed: Held, that the plea was no sufficient answer to the bill, and was rightfully overruled.—BROWN v. SOLARY, Fla., 19 South. Rep. 161.

224. TRESPASS—Judgment in Unlawful Entry.—Judgment in unlawful entry and detainer is not a bar to an

action for trespass, the former being merely a possessory action.—RICHARDSON v. CALLIHAN, Miss., 19 South. Rep. 95.

225. TRESPASS—Rights of Wrongdoer to Maintain.—A girl of 18 was accustomed to help her father in the business of his farm. The father said that he left her in charge of his farm on the day in question, as he left for a few hours: Held, that the daughter was not thereby empowered to resent by force an entry upon a part of the farm that had legally been condemned for public use.—EAST JERSEY WATER CO. v. SLINGERLAND, N. J., 33 Atl. Rep. 843.

226. TRIAL—Directing Verdict.—Where plaintiff's testimony, if believed, was sufficient to support a verdict in his favor, it was error to direct a verdict for defendant, though plaintiff's evidence was uncorroborated in any, and contradicted in many, material points, and he was shown to have made statements, purposely false, out of court, contradicting his testimony.—O'BRIEN v. CHICAGO & N. W. RY. CO., Wis., 66 N. W. Rep. 363.

227. TRUST—Agreement to Pay Interest.—A circular was issued under the heading "Depositors' Co-operative Association," signed by one as "Manager," inviting deposits, on which interest would be paid semi-annually. Plaintiff made a deposit with the manager, taking a certificate reciting that the money should remain one year, and bear interest at 6 per cent., but might be sooner drawn on notice, and, in case drawn before six months, no interest would be paid: Held, that the relations created by the deposit were those of debtor and creditor, and that no trust was created, but the money became at once the property of the association or manager.—LEAPHART v. COMMERCIAL BANK OF COLUMBIA, S. Car., 23 S. E. Rep. 939.

228. TRUSTEE — Services Inconsistent with Trust.—Where a partner, as a club member, becomes one of a club committee to purchase real estate for it, expressly agreeing to charge no commission, and that the club shall have the benefit of any bargain made, the club are entitled, as against the partnership, to a commission allowed by the vendor.—REDHEAD v. PARKWAY DRIVING CLUB, N. Y., 42 N. E. Rep. 1047.

229. USURY—Intent.—The price of property sold in good faith may be included in the same security with money loaned, and the fact that the price was large, and more than the property could have been sold for, does not necessarily condemn the transaction as usurious. The inquiry in such a case is whether, upon the evidence, there was any corrupt agreement or device, or shift, to receive or take usury; and in this aspect of the case the *quo animo* as well as the acts of the parties is most important.—SAXE v. WOMACK, Minn., 66 N. W. Rep. 269.

230. USURY — Joint Note. — Where three persons jointly liable on a note, after making payments thereon, including usury, separate their liability for the balance by each giving an acceptance for his share thereof, a deduction for usury may be had in an action on one of such acceptances; but the deduction shall be only a proportional part of the usury, though the other acceptances have been paid without any claim for such deduction.—DEPOSIT BANK v. ROBERTSON, Ky., 34 S. W. Rep. 23.

231. VENDOR AND PURCHASER — Breach—Tender of Performance.—Plaintiff paid $500 on the execution of a contract to convey land. The contract represented that there was on the land only a mortgage of $1,000. A mortgage for $1,500 additional, of which the vendor had no knowledge, was being foreclosed when the $500 was paid; and after the date fixed for performance of such contract there was a decree of foreclosure, under which the land was afterwards sold: Held, that a tender of performance by plaintiff was necessary to entitle him to maintain an action for breach of such contract.—ZIEHEN v. SMITH, N. Y., 42 N. E. Rep. 1080.

232. VENDOR AND PURCHASER—Specific Performance —Equity.—Where a vendor of land sues to enforce a specific performance of an executory contract by the purchaser, although the substantial part of the relief asked is the recovery of money, and though he also asks the enforcement of a vendor's lien, the action is clearly triable in equity.—GATES v. PARMLY, Wis., 66 N. W. Rep. 253.

233. WILLS—Ademption of Bequest.—A general bequest to a child, of a share of testator's personalty, may be satisfied *pro tanto* by a conveyance of real estate during the life of the testator, where such is the clear intention; such conveyance not operating as a revocation of the bequest, but as a satisfaction.—CARMICHAEL v. LATHROP, Mich., 66 N. W. Rep. 350.

234. WILLS — After-acquired Land.—Testatrix, after giving a legacy to one of her children for her separate use, devised "all" of her land to other children and a grandchild, specifying of what such land consisted, and also gave, to one of the children to whom the land was given, a legacy reciting that it was given to make him "even" with the other children on account of advances previously made them. She then directed her debts to be paid out of the "balance" of her "property," and, "should there be anything left," provided that it should be divided among her own children, to whom the land in part was given: Held, that after-acquired land passed under the will.—WEBB v. ARCHIBALD, Mo., 34 S. W. Rep. 54.

235. WILL—Life Tenants and Remainder-men.—Testator left his estate to his executors, in trust, to receive and collect the rents of the real estate, and the income and profits of the personal estate, and after deducting taxes and certain annuities, to pay the residue of the net income to his daughter during her life, the *corpus* of the estate to go to her children after her death. The executors invested a part of the estate in mortgages, which were foreclosed, they buying in the property, in order to protect the estate, for the amounts of the mortgages: Held, that the testator's daughter was entitled to the profits arising from the subsequent sale of such property at an advance.—IN RE PARK'S ESTATE, Penn., 33 Atl. Rep. 884.

236. WILLS—Mental Capacity—Evidence.—That testator for 10 years suffered greatly from a cancer in his face, which, before the execution of the will, had destroyed one eye, and partly destroyed the sight of the other, together with the opinion of non-experts, none of whom testified to any facts which could reasonably be made the foundation of an opinion, that testator was of unsound mind, is insufficient to sustain a verdict that testator was of unsound mind, as against direct evidence in support thereof.—RARICK v. ULMER, Ind., 42 N. E. Rep. 1099.

237. WILL—Mental Capacity—Non-expert Witness.—A non-expert testifying to the mental capacity of a testator cannot, on re-direct examination, be asked his opinion of the mental capacity of a testator in a hypothetical case.—SAGAR v. HOGMIRE, Mich., 66 N. W. Rep. 326.

238. WITNESS—Juror—Competency.—A juror is a competent witness for a party in a suit on a trial before himself and fellows, where he testifies only as to the character of the party calling him.—WHITE v. STATE, Miss., 19 South. Rep. 97.

239. WITNESS—When Interested Adversely to Estate.—Under Rev. St. 1894, § 506 (Rev. St. 1881, § 498), providing that in suits in which an estate is interested, and to which its administrator or executor is a party, "any person who is a necessary party to the issue or record, and whose interest is adverse to such estate," shall be incompetent to testify against the estate as to matters occurring during the life-time of the decedent. In an action to charge an estate with a claim on the ground that the decedent was a member of firm, another member of the alleged firm, though not a party, is incompetent to prove the partnership as against the estate, but he is competent to show the correctness of plaintiff's account.—LEACH v. DICKERSON, Ind., 42 N. E. Rep. 1031.